Supreme Court, U.S.
FILED
98 392 SEP 2 1998
OFFICE OF THE CLERK

No. 98-____

In The Supreme Court of the United States
October Term, 1997

Michael W. Walker, Aearth Development, Inc., Aearth Preparations, Inc., and Coal Processors, an Arkansas Joint Venture, Petitioners,

v.

First Commercial Bank, N.A., Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

RONALD J. MANN*
Assistant Professor of Law
THE UNIVERSITY OF MICHIGAN LAW SCHOOL
625 So. State Street
Ann Arbor, MI 48109-1215
(734) 764-5571

ELIZABETH WARREN
LEO GOTTLIEB
Professor of Law
HARVARD LAW SCHOOL
Hauser Hall, Room 206
Cambridge. MA 02138

MICHAEL G. BURK
BURK LAW FIRM, P.C.
711 San Antonio Street
Austin, TX 78701
(512) 476-8350

JAMES E. BURK
BURK LAW FIRM, P.C.
Suite 701
1818 N Street, N.W.
Washington, DC 20036

**Counsel of Record*

9H PP

QUESTION PRESENTED

Whether the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a), allows a State to forfeit a corporation's charter for nonpayment of franchise taxes while the corporation is in bankruptcy.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petitioners are (I) an individual, Michael W. Walker; (II) two Arkansas corporations, Aearth Development, Inc. and its wholly owned subsidiary, Aearth Preparations, Inc.; and (III) an Arkansas joint venture, Coal Processors. Petitioner Walker is the majority shareholder in petitioner Aearth Development, Inc. Petitioner Aearth Development, Inc. is the majority venturer in petitioner Coal Processors; the other venturer is George Locke.

The other shareholder in Aearth Development, Inc. is Charles Enderlin. Except as indicated above, none of the corporate petitioners owns any interests in any other entities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 13

Appendix A --
Opinion of the Supreme Court of Arkansas (April 30, 1998) 1a

Appendix B --
Order of the Circuit Court of Pulaski County, Arkansas, Second Division (June 21, 1996) 17a

Appendix C --
Judgment of the Circuit Court of Pulaski County, Arkansas, Second Division (May 20, 1996).....23a

Appendix D --
Opinion of the Supreme Court of Arkansas (July 18, 1994).....27a

Appendix E --
Denial of Appellee/Cross-Appellants' Petitions for Rehearing by the Supreme Court of Arkansas (June 4, 1998).....33a

Appendix F --
Ruling on Appellee/Cross-Appellant's Petition for Rehearing by the Supreme Court of Arkansas (September 19, 1994).....34a

Appendix G --
Appellee/Cross-Appellants' Petition for Rehearing and Brief in Support of Rehearing (August 3, 1994) 35a

Appendix H --
Appellees/Cross-Appellants Aearth Corporations' and Coal Processors' Petition for Rehearing (May 18, 1998).....49a

Appendix I --
Appellee/Cross-Appellant Walker's Petition for Rehearing (May 18, 1998).....63a

TABLE OF AUTHORITIES

CASES **Page(s)**

Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association,
997 F.2d 581 (1993) 10
In re Golden Plan (*Coben v. Lebrun*),
37 B.R. 167 (Bankr. E.D. Calif. 1984) 12
In re National Cattle Congress, Inc.,
179 B.R. 588 (Bankr. N.D. Iowa 1995) 10-11
In re Walker (*Walker v. Wilde*),
927 F.2d 1138 (CA10 1991) 12
Midlantic National Bank v. New Jersey Dep't of Environmental Protection,
474 U.S. 494 (1986) 8, 9
State of Missouri v. U.S. Bankruptcy Court,
647 F. 2d 768(1981) 11, 12

STATUTES

11 U.S.C. § 362 . . . . . i, 2-3, 7, 8, 9, 10, 11, 12
28 U.S.C. § 1257(a) 2

OTHER AUTHORITIES

H.R. Rep. No. 95-595, (1977) 8

In The Supreme Court of the United States
October Term, 1997

No. 98-____

Michael W. Walker, Aearth Development, Inc., Aearth Preparations, Inc., and Coal Processors, an Arkansas Joint Venture, Petitioners,

v.

First Commercial Bank, N.A., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. A) is reported at 969 S.W.2d 146. The remittitur order of the Arkansas Circuit Court (Pet. App. B) is unreported. An opinion of the Arkansas Supreme Court on a previous appeal (Pet. App. D) is reported at 880 S.W. 2d 316.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on April 30, 1998. The court denied a timely petition for rehearing on June 4, 1998. Pet. App. E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities, of —
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title * * * ;
> >
> > * * * *
> >
> > (3) any act to * * * exercise control over property of the estate;
> >
> > * * * *

(b) The filing of a petition * * * does not operate as a stay —

* * * *

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

STATEMENT

After a 1996 trial in the Circuit Court of Pulaski County, Arkansas, a jury returned a verdict in favor of petitioners in the amount of $22,500,000. The circuit court remitted the verdict to about $8,200,000. Pet. App. D. On appeal, the Supreme Court of Arkansas reversed and dismissed petitioners' claims. Pet. App. A.

1. Petitioner Walker formed petitioner Aearth Development, Inc. ("Aearth") in 1978. Aearth and its wholly owned subsidiary petitioner Aearth Preparation, Inc. (collectively, the "Aearth Petitioners") engaged in a variety of coal-mining operations in Arkansas. In 1981, Aearth formed petitioner Coal Processors, a joint venture with Arkala Coal Company. From 1980 to 1982, respondent First Commercial Bank, N.A. made several loans to the various petitioners to fund coal-mining operations. By May of 1982, the balance due on all of the loans from respondent to petitioners totaled about $3,000,000. Relying on alleged defaults by petitioners on the various loan agreements, respondent in May of 1982 took possession of funds that

had been placed in escrow by petitioners and eventually caused the shutdown of all of petitioners' mining operations. Pet. App. A, 969 S.W.2d at 148-49.

2. In November of 1982, the Aearth Petitioners filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. In November of 1984, while those bankruptcy proceedings were continuing, the State of Arkansas purported to forfeit the corporate charters of the Aearth Petitioners for their failure to pay franchise taxes. The State did not obtain relief from the automatic stay before purporting to forfeit the charters. Pet. App. A, 969 S.W.2d at 148.

3. Petitioners originally filed suit in November 1984. The present case reflects a consolidation of two separate suits filed, respectively, by Walker (in 1990) and by the Aearth Petitioners (in 1991). The suits sought damages for injuries to their businesses caused by, *inter alia*, respondent's tortious interference with contracts and business relations, fraudulent inducements of a loan signing, and seizure of funds in Aearth's escrow account. After the case was transferred to the state chancery court, that court conducted a bench trial and entered a judgment in favor of respondent. On appeal, the parties disputed a number of issues. Among other things, respondent argued that the purported charter forfeitures deprived the Aearth Petitioners of any capacity to pursue their claims. Petitioners contested that claim, arguing that the Bankruptcy Code's automatic stay rendered the purported charter forfeitures invalid. Cross-Appellees' Supplemental Abstract and Response Br.

14-20.[1] Petitioners also argued that the transfer to the chancery court had been improper and deprived them of their constitutional right to a jury trial in the circuit court.

The Supreme Court of Arkansas held that the transfer to the chancery court had been improper and remanded the case for a jury trial by the circuit court. The court did not expressly address the automatic-stay question or the capacity of petitioners to pursue the claims at issue here. Pet. App. D.

4. After a jury trial in the circuit court, a jury returned a verdict in favor of petitioners in the amount of $22,500,000. The circuit court then entered a judgment for the verdict amount. The circuit court thereafter entered a remittitur order reducing the judgment to about $8,200,000. Pet. App. B.

5. On appeal, the Supreme Court of Arkansas reversed the judgment of the circuit court and dismissed all of petitioners' claims. Pet. App. A.

a. The court first ruled that Walker had no standing to pursue the claims of the two Aearth Petitioners. Pet. App. A, 969 S.W.2d at 150-152. The court concluded that Walker could not pursue the claims for tortious interference with contractual relations because the claims rested on contracts between respondent and the Aearth Petitioners, to which Walker was not a party. Pet. App. A, 969 S.W.2d at 150. The court similarly rejected Walker's

---

[1] We have lodged a copy of that brief with the Clerk of the Court.

standing to pursue claims of fraud because the fraudulent representations by respondent had been made for the benefit of the Aearth Petitioners, not Walker. Pet. App. A, 969 S.W.2d at 150. Furthermore, Walker could not pursue a claim for conversion of escrowed funds because he had no personal interest in the funds. Pet. App. A, 969 S.W.2d at 150-51.

Finally, acknowledging Walker's status as a co-maker and guarantor on most of the loans in question, the court nevertheless rejected Walker's standing to raise the various claims against respondent. The court stated simply that a guarantor's obligation "is distinct from the principal obligation." Pet. App. A, 969 S.W.2d at 152.

b. More importantly for this petition, the court also concluded that the Aearth Petitioners had no status to bring the claims on their own account. Respondent argued that the Aearth Petitioners had been deprived of capacity to sue by the purported charter forfeitures in 1984. Respondent's 1997 Ark. Sup. Ct. Br. 919. Petitioners argued on that point that the court implicitly had accepted their automatic-stay argument when it resolved that question in their favor in its 1994 decision and that it was too late for respondent to reopen the question. Petitioners' 1997 Ark. Sup. Ct. Br. 68-69.[2] The court nevertheless addressed respondent's claim. It pointed to the November 27, 1984 revocation of the charters of the Aearth Petitioners and stated that Arkansas "law provides that a corporation cannot

---

[2] We have lodged a copy of that brief with the Clerk of the Court.

file a complaint in court after it ceases to exist legally." Accordingly, the court ruled that all of the claims of the Aearth Petitioners should be dismissed. Because of the drastic ruling that Walker could not pursue any of those claims, the result is that no one, not even the shareholders, succeeded to any property owned by the corporations. Pet. App. A, 969 S.W.2d at 153.

6. Walker and the Aearth Petitioners filed separate petitions for rehearing. The Aearth Petitioners argued that the decision of the Arkansas court failed to give due weight to the automatic stay. Pet. App. H. The court denied the petitions for rehearing without comment. Pet. App. E.

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Arkansas flouts the Bankruptcy Code's automatic stay, a cornerstone of the federal bankruptcy system. That decision is flatly inconsistent with the text of the Bankruptcy Code as well as the uniform application of the Code by the federal courts. As a matter of our federal structure, the decision is particularly troubling because it involves an action by a state court permitting a state's regulatory authorities to contravene a clear mandate of federal law. Review by this Court is the only remedy for that mistake.

1. Central to the American bankruptcy system is the immediate protection that each debtor receives upon the filing of a petition for relief in bankruptcy. That protection comes from an automatic stay under 11 U.S.C. § 362(a).

That stay takes effect by operation of law, without specific action by the courts or any of the parties, and generally bars any action against the debtor during the pendency of the bankruptcy proceeding. As the Court has recognized, the automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic National Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 503 (1986).

The language of Section 362(a) is notable for its breadth, which extends to, among other things, any "judicial, administrative, or other action or proceeding against the debtor," Section 362(a)(1), and "any act to * * * exercise control over property of the estate," Section 362(a)(3). The action purporting to forfeit the Aearth Petitioners' charters in this case falls directly within the plain language of both of those subsections.

First, the purported forfeiture, which occurred during the pendency of the bankruptcy, is an "administrative * * * action * * * against the debtor" of the type covered by Section 362(a)(1). *See also* H.R. Rep. No. 95-595, p. 340 (1977) (specifically stating that the automatic stay extends to "license revocation * * * proceedings"). The purported forfeitures in this case fall squarely within the prohibition of Section 362(a)(1).

Second, by depriving the Aearth Petitioners of their existence, and depriving Walker (then in bankruptcy) of his ownership interest in those entities, the action involved the ultimate exercise of control over property of the estate: outright destruction of it. Accordingly, the purported

forfeitures also constitute acts "to * * * exercise control over property of the estate" in violation of Section 362(a)(3). Thus, those actions are void and the Aearth Petitioners' charters in fact remain valid.

The Bankruptcy Code does provide an exception to the automatic stay that permits "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." Section 362(b)(4). By its own terms, that provision does not provide an exception for the state action in this case. Section 362(b)(4) authorizes an exception to the automatic stay only for actions against the debtor under Section 362(a)(1); it does not authorize activity that involves the exercise of control over property of the estate and thus violates the stay imposed by Section 362(a)(3).

In addition, even as to actions that violate subsection (a)(1), Section 362(b)(4) is limited to "enforce[ment] of police or regulatory power." This Court has explained that the exception applies only when "a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws." *Midlantic*, 474 U.S. at 504 (quoting H.R. Rep. No. 95-595, p. 343 (1977)). The exception does not authorize actions, such as this one, premised solely on the failure to comply with monetary obligations owed to the governmental entity.

The injury that the state court's decision imposes on federal bankruptcy policies is accentuated by the court's holding that petitioner Walker cannot pursue the claims of

the Aearth Petitioners after forfeiture of their charters. Thus, as a result of the decision below, those claims — which the state's own trial court determined to be worth millions of dollars — have disappeared altogether. Further, the decision--rendering a multi-million dollar asset of a bankrupt estate unusable in perpetuity by petitioners or anyone else--violates not only the automatic stay but the Takings and Due Process Clauses of the United States Constitution. Most important, for Federal Supremacy, federal law cannot permit a state administrative action to destroy a multi-million dollar asset that belongs to a pair of corporations and their controlling shareholder at a time when all three are under the protection of a federal bankruptcy court.

2. The decision of the Supreme Court of Arkansas conflicts with the analysis federal courts uniformly have applied to similar problems under Section 362. Those courts have recognized that Section 362(a)(3) does not permit government entities to revoke charters and licenses held by a bankrupt debtor. The leading case is the decision of the Ninth Circuit in *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association*, 997 F.2d 581 (1993). That case concluded that the Hawaii Department of Commercial and Consumer Affairs violated Section 362(a)(3) when it revoked a corporation's charter while the automatic stay was in effect. *See id.* at 588.[3] *See also In re National Cattle*

---

[3] The major problem in that case was that the debtor's plan of reorganization already had been confirmed. Accordingly, the court had to determine whether the stay continued even after confirmation. 997 F.2d at 587-90. The

Congress, Inc., 179 B.R. 588, 593 (Bankr. N.D. Iowa 1995) (holding that revocation by the Iowa Racing and Gaming Commission of the debtor's pari-mutuel dog racing license while the debtor was in bankruptcy violated Section 362(a)(3) as an act exercising "control" over an asset of the debtor), *remanded on other grounds*, 91 F.2d 1113 (CA8 1996). The decision of the Arkansas court accepting the validity of such a revocation squarely conflicts with those decisions.

Other courts have reached analogous results under Section 362(a)(1). Courts have barred actions (like the one here) by governmental entities designed to respond to pecuniary concerns, such as the failure of the debtor to pay money owed to the governmental entity that is taking the challenged actions. For example, the Eighth Circuit in *State of Missouri v. U.S. Bankruptcy Court*, 647 F.2d 768 (1981), considered an effort by Missouri grain regulatory authorities take possession of grain elevators operated by the bankrupts; the authorities were attempting to protect the interest of third parties in grain deposited in the warehouses. The Eighth Circuit explained that Section 362(b)(4) "refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court." 647 F.2d at 776. Because the "grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors' property and not to

---

present case is easier, because the charters were revoked at a time when the stay plainly was in effect.

matters of public safety and health," the automatic stay prohibited the state regulatory action. *Id.*

Applying the Eighth Circuit's understanding of the automatic stay, it is clear that the State of Arkansas was not empowered to forfeit petitioners' charters while they were in bankruptcy. Because the forfeiture of the charter is nothing but "an undisguised attempt by the state to induce collection of a discharged debt from the licensee," *In re Walker* (*Walker v. Wilde*), 927 F.2d 1138, 1142 (CA10 1991) (holding that license revocation violates nondiscrimination rules in Section 524), it plainly is the type of collection activity directly barred by the automatic stay. *See In re Golden Plan* (*Coben v. Lebrun*), 37 B.R. 167, 170 (Bankr. E.D. Calif. 1984) (citing *Missouri*, holding that Section 362(a)(1) invalidates a post-bankruptcy action by the California Franchise Tax Board that revoked the charter of the debtor for the alleged non-payment of taxes, and holding that debtor's corporate name is property of the estate protected by the automatic stay).

* * * * *

The lower federal courts that have considered similar questions uniformly have concluded that state regulatory authorities cannot forfeit debtors' charters and licenses for nonpayment of fees while federal bankruptcy proceedings are pending. The decision of the state court below ignores the federal law that governs the issues presented by this case. As the *Missouri* case illustrates, this case is not unique in presenting state authorities who are unsympathetic to the policies articulated in the federal Bankruptcy Code. Because

the automatic stay plays a crucial role in the federal bankruptcy system, it is particularly important that state authorities respect the limitations that the stay imposes on their authority. Review by this Court is the only avenue for ensuring due respect of that federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Michael G. Burk
James E. Burk
Ronald J. Mann
Elizabeth Warren

September 1998

APPENDIX

APPENDIX A

SUPREME COURT OF ARKANSAS.

No. 96-1495.

FIRST COMMERCIAL BANK, N.A.

v.

Michael W. WALKER, Aearth Development, Inc., Aearth Preparations, Inc., and Coal Processors, A Joint Venture

---

April 30, 1998.

Related business entities and principal brought lender-liability suit, alleging wrongful conduct of bank and its predecessors caused the failure of coal mining, processing, and sales business. After matter was remanded for transfer from the Chancery Court, 317 Ark. 617, 880 S.W.2d 316, the Pulaski Circuit Court, Chris Piazza, J., entered verdict for entities and principal in amount of $8.2 million. Bank appealed. The Supreme Court, Thornton, J., held that: (1) principal did not have standing individually or as shareholder or guarantor; (2) corporate entities lacked capacity to sue after their corporate charters were revoked for nonpayment of franchise taxes; and (3) dissolved joint venture did not have capacity to sue.

Reversed and dismissed.

Hani W. Hashem, Special Justice, filed concurring opinion.

Barber, McCaskill, Jones & Hale, P.A. by Glenn W. Jones, John S. Cherry and Joseph F. Kolb and Williams & Anderson by Philip S. Anderson, Leon Holmes and Katharine R. Cloud, Little Rock, for appellant.

The Burk Law Firm by Michael G. Burk, Austin, Walker & Black by Kendell R. Black, Little Rock, and James E. Burk, Washington, DC, for appellees.

THORNTON, Justice.

Plaintiffs, Michael W. Walker, Aearth Development, Inc. (Aearth), Aearth Preparation, Inc., and Coal Processors, brought the underlying lender-liability action, asserting that wrongful actions of defendant, First Commercial Bank and its predecessors (the Bank), caused the failure of plaintiffs' coal mining, processing, and sales business in the Arkansas River Valley. This is the second appeal involving the disposition of these issues. The first appeal followed the chancery court's judgment in favor of the Bank on all allegations after a twelve-day trial. On appeal, the jurisdiction of the chancery court was challenged, and we determined that the lower court erred in transferring the case from circuit court to the chancery court because the chancery court lacked subject-matter jurisdiction. See Walker v. First Commercial Bank, 317 Ark. 617, 880 S.W.2d 316 (1994) (Walker I). We reversed and remanded with instructions to transfer the case to circuit court, without binding the circuit court on any issue decided by the chancellor.

Individual plaintiff Michael Walker was a principal stockholder in Aearth, which formed a wholly owned subsidiary, Aearth Preparation, Inc. Aearth entered into a joint venture with other parties to form Coal Processors. We refer jointly to Aearth Development, Inc., Aearth Preparation, Inc., and Coal Processors as "the Aearth business entities." Aearth held a 75% interest in Coal Processors, and the

remaining 25% was acquired by George Locke, who is not a party to this proceeding. In addition to being a stockholder and officer of Aearth, Mr. Walker was a guarantor of notes executed by the Aearth business entities to obtain funds from the Bank and other sources of credit.

At trial in the circuit court, the Bank challenged the standing and capacity of plaintiffs as a threshold matter, and also urged the court to declare that all of plaintiffs' claims were barred on principles of judicial estoppel because those claims were not asserted during prior bankruptcy proceedings. Over the Bank's objections, issues of fraud, conversion, and tortious interference with contractual relations were presented to the jury, which returned a $22.5 million verdict. The court reduced this verdict by a set-off that the court determined to be greater than $7.3 million, which, together with a remittitur of $7 million from the award of punitive damages, resulted in a verdict of $8.2 million.

From this order, the Bank appeals and plaintiffs cross-appeal, together asserting seventeen claims of error. We have determined that the Aearth business entities did not have the capacity to bring the action for "lender liability" and that Mr. Walker did not have standing to pursue, either as a stockholder or guarantor, the same causes of action asserted by the Aearth business entities. Accordingly, we reverse and dismiss.

FACTUAL BACKGROUND

Mr. Walker formed Aearth Development, Inc., in 1978. Aearth entered into a joint venture with Russell Mining Company of Kansas. At the time of this joint venture, Mr. Walker owned 40% of Aearth, and the balance of the stock was held by three other persons. Some coal was produced and sold, primarily to charcoal markets. In early 1980, Russell Mining withdrew from the joint venture. At that

time, Aearth owned a small bulldozer, a front-end loader, and a scraper, and depended on contractors to provide their own equipment. Aearth had not yet made a profit from its operations. An overseas purchaser expressed an interest in Arkansas coal, but the coal had a high sulfur content with sulfur in the form of pyretic sulfur or "fools gold," which often prevented the raw product from meeting the requisite specifications.

Aearth sought development capital to enhance the quality of its product in order to compete in the market place. In December 1980, Mr. Walker engaged the investment firm of Collins, Locke, and Lasater to assist in obtaining a target of $10,000,000 in development financing. One of the principals of the firm, George Locke, became personally interested in the enterprise. On December 16, 1980, Mr. Locke persuaded the Bank to grant Aearth, which had virtually no working capital, a line of credit of $500,000, secured by the personal guarantees of Mr. Locke and Mr. Walker. By April 27, 1981, the full amount of the note had been advanced, and no repayments had been made on that note. Aearth's inventory and accounts receivable had been pledged as collateral to the Bank, and this security agreement was never terminated.

On May 20, 1981, Aearth, Mr. Locke, and Mr. Walker acquired a second line of credit from the Bank in the amount of $800,000. No repayments were made on this loan.

In June 1981, Aearth entered into a joint venture with Arkala Coal Company. This joint venture, Coal Processors, named Mr. Locke as managing agent. With Mr. Locke's assistance, the joint venture obtained two lines of credit from the Bank, aggregating an additional sum of $1,475,000 to be used in constructing a coal- washing facility. The notes for these lines of credit were signed by Aearth, Mr. Locke, and Mr. Walker, as well as by the principals of Arkala. These notes were fully advanced and were replaced by a

single note, executed on November 30, 1981, by Coal Processors, Mr. Locke, and Mr. Walker, among others.

Notwithstanding promises made in several loan agreements with the Bank to refrain from entering into other loan agreements and encumbering assets and collateral already pledged to the Bank, Aearth, together with Mr. Locke and Mr. Walker, entered into two separate agreements with other creditors using some of the same assets as security. Aearth executed a note on December 23, 1981, in the amount of $716,000 to Bono, DiGiglia, and Levingston of Louisiana; however, only about $500,000 of this note was actually advanced. On January 9, 1982, Aearth also executed a security agreement pledging its assets to Taylor Machinery of Memphis as security for $662,667.36 that Taylor Machinery advanced to Aearth.

Additionally, on December 10, 1981, the Bank advanced to Coal Processors an additional $150,000. The note for this advance was due on March 10, 1982. Aearth executed another note to the Bank on April 9, 1982, for a $300,000 loan, which was due on May 10, 1982. By April, the Aearth business entities were in default on all loans except this note that was due on May 10, 1982, and the entities owed the Bank $2,925,000, plus interest.

On April 15, 1982, Aearth borrowed $272,000 from Dan Lasater, who personally borrowed this amount from the Bank, for the purpose of paying two past due installments on Coal Processors' $1,475,000 note to the Bank. Mr. Lasater's demand note to the Bank was due on or before May 14, and the Bank agreed to subordinate its right to any funds received from Aearth to Mr. Lasater. Aearth committed to Mr. Lasater that this debt would be paid from the first proceeds of a specified sale of coal, and Aearth instructed the broker for the purchaser of the coal that $272,000 of the proceeds were payable to Mr. Lasater.

While the Aearth business entities had also pledged proceeds from the sale of this coal to Taylor Machinery and other creditors, the specific instructions given by Aearth to the broker did not provide for any distribution of these funds to Taylor Machinery. When the $245,823.96 proceeds from the first sale were deposited in an escrow account at the Bank, the Bank applied these proceeds to Mr. Lasater's loan.

Taylor Machinery had become concerned about the repayment of its $662,667.36 advance, and on or about April 6, Taylor Machinery had drawn down a $300,000 line of credit from the Bank, reducing its exposure to about $360,000. Aearth had orally represented that some of the proceeds from the first sale of coal would be applied to Taylor Machinery's claims, and when these funds were not forthcoming, Taylor Machinery orally told Aearth to park the equipment pending some resolution of the financial problems. After several weeks, Taylor Machinery arranged to have its equipment picked up and returned to Memphis.

The Aearth business entities discontinued operations and filed Chapter 11 bankruptcy proceedings in November 1982. In December 1983, the bankruptcy court converted the Chapter 11 proceedings to a Chapter 7 liquidation. In May 1984, Mr. Walker filed a personal Chapter 7 bankruptcy petition.

STANDING AND CAPACITY OF THE PARTIES

We first consider whether, under principles of Arkansas law, plaintiffs had standing or capacity to bring an action for lender liability against the Bank. Plaintiffs argue that these issues are not preserved for our review. We disagree. The issue of standing and capacity was preserved by a timely motion for a directed verdict that was renewed at the conclusion of the case.

Plaintiffs argue further that the issues were resolved in Walker I, and that by determining that the chancery court did not have subject-matter jurisdiction, we decided these issues sub silentio and that plaintiffs have standing and capacity as a result of the law of the case and res judicata. This argument also lacks merit.

The doctrine of law of the case does prevent an issue raised and decided in the first appeal from being raised in a subsequent appeal. Bennett v. State, 308 Ark. 393, 825 S.W.2d 560 (1992). However, our decision in Walker I was predicated solely on the issue whether the chancery court had subject-matter jurisdiction. We stated expressly that we "need not address any other issues in view of the ruling on this dispositive issue." Walker v. First Commercial Bank, 317 Ark. at 619, 880 S.W.2d at 317. Our determination that the chancery court was without jurisdiction afforded the trial court a clean slate on which to consider the entire case, including motions to dismiss for lack of standing, motions for summary judgment, and all other matters, as though the chancery court had not acted at all. Therefore, our review of standing and capacity is not barred by the law of the case.

The doctrine of res judicata likewise does not bar the circuit court's or our consideration of standing and capacity. For res judicata to apply, the claim must have been adjudicated on the merits; this requirement presupposes that the court in which the claim was litigated properly had jurisdiction over those proceedings. Crockett & Brown, P.A. v. Wilson, 314 Ark. 578, 864 S.W.2d 244 (1993). Here, the chancery court rendered a judgment for the Bank on the merits, but we reversed that decision for lack of subject-matter jurisdiction. Therefore, the circuit court was not required by the doctrine of res judicata to adopt on remand any of the Chancellor's holdings.

The gravamen of plaintiffs' complaint is that the Bank's wrongful actions damaged the Aearth business entities, breached an alleged agreement to provide long-term financing to the Aearth business entities, impaired their ability to obtain other financing, interfered with their contracts with others, and wrongfully applied funds belonging to the business entities to a debt owed by the business entities. For the reasons stated below, we have determined that Mr. Walker, as an individual, lacked standing to bring this action against the Bank for compensatory and punitive damages that the Aearth business entities allegedly suffered.

A. Standing of Michael W. Walker as individual stockholder and guarantor or comaker of business debts of the corporate plaintiffs

Looking at the three underlying tort claims, each of plaintiffs' claims was based on allegations of the Bank's wrongful conduct against the Aearth business entities. Plaintiffs claimed that the Bank tortiously interfered with its contractual relations regarding the performance of contracts to sell coal and the performance of various other contractual commitments. All of these allegations were based on the Bank's actions with respect to the Aearth business entities' performance of their contracts with third parties. To prevail on a claim for interference with a contractual relation, a plaintiff must present evidence and prove that a third party failed to continue a contractual relationship with the claimant as a result of the defendant's improper conduct. Navorro-Monzo v. Hughes, 297 Ark. 444, 763 S.W.2d 635 (1989). Plaintiffs did not allege that the Bank's actions caused a third party to fail to continue a contractual relationship with Mr. Walker, but rather asserted that the Bank's conduct caused a third party to discontinue a contractual relationship with the Aearth business entities.

In plaintiffs' fraud claim, they alleged that the Bank fraudulently induced them to enter into the November 31, 1981, loan agreement by promising to provide long-term financing for all the debts of the Aearth business entities. Similarly, only the Aearth business entities could assert this tort claim. There was no allegation that the Bank had made or breached any promise to provide financing to Mr. Walker as an individual; rather, the claim was that there was a breach of a promise to enter into long-term financing with the Aearth business entities. The Aearth business entities' loans were guaranteed by Mr. Walker, Mr. Locke, and others; however, the Aearth business entities were the primary obligors of the loans and the holders of legal title to the assets pledged for the repayment of the loans.

The third claim that went to the jury was that the Bank allegedly converted $245,000 belonging to the Aearth business entities that had been deposited in an Aearth escrow account. Plaintiffs asserted that the premature crediting of these proceeds from the specified sale of coal to reduce Mr. Lasater's debt to the Bank caused Taylor Machinery to withdraw its equipment, resulting in Aearth's downfall. There is no allegation that Mr. Walker asserted any right or interest in these funds for his own individual benefit; therefore, the Aearth business entities were again the only parties who could assert, as owners, that the Bank's actions constituted a conversion of the escrow account.

There is a near universal rule that a corporation and its stockholders are separate and distinct entities, even though a stockholder may own the majority of the stock. Banks v. Jones, 239 Ark. 396, 390 S.W.2d 108 (1965). A corporation has the power to sue and be sued in its corporate name. Ark.Code Ann. § 4-26-204(a)(2) (Repl.1991). The court of appeals has stated that a corporation is "a legal entity which, being distinct from its members, owns the corporate property and owes the corporate debts, is the

creditor to sue or the debtor to be sued, has perpetual existence, and can act only through its duly constituted organs, primarily its board of directors." Arkansas Iron & Metal Co. v. First Nat'l Bank of Rogers, 1 6 Ark.App. 245, 251, 701 S.W.2d 380, 383 (1985).

Generally, the officers and members of a corporation may not sue or be sued in their own name. See 19 C.J.S. Corporations § 711, at 364 (1990). A corporate officer has no individual right of action against a third party for alleged wrongs inflicted on the corporation, even if the officer is the sole shareholder. Id. § 629, at 277.

A recent federal case provides some guidance on a similar question. See Taggart & Taggart Seed v. First Tenn. Bank Nat'l Ass'n, 684 F.Supp. 230 (E.D.Ark.1988). In Taggart, the defendant bank had provided plaintiffs with an $18 million line of credit and repayment of the funds advanced were guaranteed by the corporations' principal shareholders Tommy Taggart, Charles Taggart, and their spouses, as well as other guarantors. The loan was further secured by the pledge of the corporation's equipment, facilities, and inventory. The bank considered that an act of default had occurred and terminated the agreement. The note was repaid in full, and plaintiffs secured another line of credit. The corporation and the individual stockholders and guarantors filed a lender-liability action, with allegations including bad faith, misrepresentation, deceit, constructive fraud, interference with contractual relations, and economic loss. Id.

The court granted the bank's motion to dismiss all parties except the corporation. Id. The district court stated that the claims of the individual guarantors that they suffered damages because of the bank's breach of its promise to lend further money to the corporation was "an attempt to piggyback their claims on top of Taggart Seed's." Id. at 234. The court noted that the injuries that the individuals

alleged were "incidental to and derivative of the injury alleged to the corporate entity. . . . To allow [the individuals] to prosecute this action in their own names would . . . violate the near universal rule that an action to redress injuries to a corporation must be brought in the corporate name." Id.

In concluding that the claims of the individual plaintiffs were properly dismissed, the district court stated:

> [T]he status of some of the plaintiffs as guarantors of the April, 1984, loan agreement does not give them standing to bring this action. . . . [T]he guarantors do not contend that they contributed toward the repayment of the note. The corporate entity, Taggart & Taggart Seed, Inc., is the real party in interest, not the guarantors who no longer have even a contingent liability on the note and who do not allege that they were ever called on for its repayment.

Id. at 235.

As in Taggart, there is no showing in the case before us that Mr. Walker has made any contribution toward payment of the notes that he guaranteed, even though it appears that Mr. Walker has been discharged from bankruptcy. Also, as stated above, the wrongs that plaintiffs sought to redress were corporate injuries, not injuries to Mr. Walker as an individual.

We recognize that Mr. Walker also asserted that because he was a guarantor of the various loans, he should have standing as a "party" to the loan agreements. However, the undertaking of the principal debtor, here the Aearth business entities, is independent of the promise of the guarantor, Mr. Walker. First American Nat'l Bank v. Coffey-Clifton, Inc., 276 Ark. 250, 633 S.W.2d 704 (1982). A guarantor is one who makes a contract, which is distinct from the principal

obligation, to be collaterally liable to the creditor if the principal debtor fails to perform. Id. (citing 10 Samuel Williston and Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1211, at 685-86 (3d ed.1967)); see also First Nat'l Bank of Helena v. Solomon, 170 Ark. 555, 280 S.W. 659 (1926). There is no holding in any of these cases that a guaranty relationship merges with that of a principal borrower so as to allow the guarantor to pursue the borrower's causes of action.

In Schmidt v. McIlroy Bank & Trust, 306 Ark. 28, 811 S.W.2d 281 (1991), the appellants made a similar argument that they, as guarantors, should have standing to pursue lender-liability claims on behalf of the corporate entity. In concluding that the individual appellants had no standing to sue for injuries to the corporation, we observed:

> [Appellants'] argument is that when the corporation's charter was revoked for failure to pay franchise fees, the officers and shareholders were considered to be operating the business as a partnership and were individually liable for the obligations of the de facto corporation, and since they were subjected to individual liability as partners, they ought to be allowed, in fairness, to bring suit in the same capacity. The argument, while novel, is without merit. . . . The effect of revocation was that the corporation lost its capacity to sue, and this particular type of corporate cause ceased to exist. To allow the individual appellants to bring this cause of action would effectively reverse prior law which prohibits suits by a corporation whose charter has been revoked. . . .

Id. at 33, 811 S.W.2d at 283-84 (citations omitted).

Mr. Walker's status as a majority shareholder does not vest him with standing to pursue causes of action that belong to the corporate borrowers. Likewise, in borrowing the

funds, Mr. Walker acted as a representative of the Aearth business entities and as a guarantor of the debt. Although he was shown as a "maker" on some of the loan documents, he does not have standing to maintain this action because the Aearth business entities were the principal borrowers and sole recipients of the borrowed funds. Mr. Walker acted only as a guarantor, even on those notes that he signed individually and as a representative of Aearth business entities.

We conclude that Mr. Walker did not have standing to bring this action either as an individual stockholder and officer of the Aearth business entities or as a guarantor of the debts of the Aearth business entities.

B. Capacity of the Aearth Business Entities

On November 27, 1984, before the original complaint was filed in this matter, the corporate charters of Aearth Development, Inc., and Aearth Preparation, Inc., were revoked for nonpayment of franchise taxes. The other business plaintiff, Coal Processors, was a joint venture with Aearth Development, Inc., and George Locke as the joint venturers at the time the Aearth business entities filed voluntary bankruptcy petitions on November 4, 1982. Under the terms of the agreement creating the joint venture, the joint venture dissolved and was terminated upon the bankruptcy, insolvency, or involuntary dissolution of either joint venturer. As provided in 11 U.S.C. § 301 (1994), the commencement of a voluntary bankruptcy constitutes an adjudication of bankruptcy, and additionally the revocation of the corporate charter resulted in the dissolution of the corporate entities.

In considering whether a corporation that had ceased to exist could initiate a lawsuit, we have stated:

> [T]he trial judge ruled, quite properly, that a corporation not in existence could not initiate a lawsuit. This is the law. In Sulphur Springs Recreational Park, Inc. v. City of Camden, 247 Ark. 713, 447 S.W.2d 844 (1969), we affirmed a trial court's dismissal of a complaint, because the plaintiff's corporate charter was not in existence when the suit was filed. . . . A suit must be initiated by a person, natural or artificial.

Fausett & Co. v. Bogard, 285 Ark. 124, 685 S.W.2d 153 (1985).

Committee for Utility Trimming Inc. v. Hamilton, 290 Ark. 283, 284-85, 718 S.W.2d 933, 934 (1986). We determined that the corporation's complaint was properly dismissed because our law provides that a corporation cannot file a complaint in court after it ceases to exist legally. Id.

From these cases, we conclude that all of the Aearth business entities lost the capacity to file suit following the dissolution of the joint venture, Coal Processors, and the revocations of the corporate charters of Aearth Development, Inc., and Aearth Preparation, Inc., on November 27, 1984.

OTHER ISSUES AND CONCLUSION

The Bank advanced a separate argument that the doctrine of judicial estoppel bars plaintiffs' claims in this case. Plaintiffs declared to the bankruptcy court that they had no lender-liability claim against the Bank, or that such a claim had a zero value. This representation was made under penalty of perjury, and if plaintiffs in this case had standing and capacity to bring their cause of action against the Bank, we would carefully consider whether the circumstances of this case call for us to apply the doctrine of judicial estoppel.

However, having determined that Mr. Walker did not have standing to bring this action and that the Aearth business entities had lost their capacity to bring suit, we need not determine whether the principles of judicial estoppel would bar these claims or address the remaining issues presented to us for decision.

We reverse and dismiss.

GLAZE, BROWN and IMBER, JJ., not participating.

J.W. GREENE, Jr., and MARK KLAPPENBACH, Special Justices, join in this opinion.

HANI W. HASHEM, Special Justice, concurs.

HANI W. HASHEM, Special Justice, concurring.

I agree with the majority decision reversing and dismissing this case. However, I write briefly to distinguish this case from Calandro v. Parkerson, 327 Ark. 131, 936 S.W.2d 755 (1997). I am concerned that, without delineation, our decision here may leave some misconception of inconsistency of decisions of this Court. In Calandro, a defunct corporation and its shareholders sued their attorney alleging malpractice, breach of contract, and deceit. The trial court granted summary judgment to the attorney on all three causes of action, finding that the revocation of the corporation's charter caused it to lose its ability to bring suit. The trial court further found that the individual shareholders lacked standing and were not proper parties. On appeal, this Court found the summary judgment proper as it related to the corporate causes of action for breach of contract and attorney malpractice. However, the claim of the individual shareholders for deceit was reversed and remanded to the trial court. I see the distinction as being the procedural stages of the appeals involved between Calandro and this case.

In Calandro, the individual shareholders asserted that the attorney had knowingly made false representations, upon which they had relied to their detriment. This Court simply ruled that there was a sufficient question of fact regarding the allegations of false representation in reversing the trial court's decision on the deceit claim. Calandro, 327 Ark. at 138, 936 S.W.2d at 759. After careful consideration and stringent scouring of the behemoth record in this appeal, I can find no credible, factual basis to believe that Michael W. Walker bore the brunt of any misrepresentation which caused him harm separate and apart from the Aearth corporate entities. "You've got to guard against speaking more clearly than you think." Washington Post, June 24, 1973, quoting Howard H. Baker, Jr., U.S. Senator.

APPENDIX B

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
– SECOND DIVISION

CV 90-56

MICHAEL WALKER, AEARTH DEVELOPMENT, INC.,
AEARTH PREPARATION, INC., AND
COAL PROCESSORS, A JOINT VENTURE
PLAINTIFFS

V.

FIRST COMMERCIAL BANK
DEFENDANT

ORDER

[FILED; 96 JUN 21 PM 5:05; CAROLYN STALEY;
CIRCUIT-COUNTY CLERK]

Comes now the Court, and having considered Defendant's Motions, hereby denies the Motion for Judgment Notwithstanding the Verdict, denies the Motion for New Trial, grants the Motion for Remittitur, and sets forth the following findings of fact and conclusions of law:

FINDINGS OF FACT

A jury trial was conducted in this case from February 5, 1996 until March 13, 1996. After deliberating, the jury found for the Plaintiffs on three issues and awarded them a combined amount of $22.5 million. That amount was broken down by the jury as follows: Michael Walker was awarded $1 million compensatory damages and $5 million punitive damages; Aearth Development was awarded $7.5 million

compensatory damages and $5 million punitive damages; Coal Processors was awarded $4 million compensatory and $0 punitive damages.

Prior to trial, the Court had ruled that the Defendant was entitled to a setoff or recoupment against a possible Plaintiffs' verdict. During a post-trial hearing, the Court determined the amount of the setoff or recoupment to be $7,310,169.05.

After the final judgement was entered, the Defendant filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, Motion for New Trial or Remittitur.

CONCLUSIONS OF LAW

Arkansas case law has held that in order for a trial court to grant a motion for Judgment Notwithstanding the Verdict under Rule 50(b) or a Motion for New Trial under Rule 59(a) of the Arkansas Rules of Civil Procedure, the court must find that the jury's verdict was not supported by substantial evidence. *Croom v. Younts*, 323 Ark. 95, 101, ___ S.W.2d ___ (1996). Substantial evidence is defined as, "evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture." *Id.* at 102.

The Court finds that there was substantial evidence to support the jury's findings in this case. The Plaintiffs' and the Defendant presented numerous witnesses who provided evidence concerning the dealings between the parties. Also, there was a large amount of written proof presented to the jury which furnished evidence of the transactions at issue in the case. The proof that was presented to the jury was sufficient to support a decision such as the jury's verdict in this case, and therefore, the Court finds it to be substantial evidence. Since there was substantial evidence to support the

jury's verdict, the Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial must be denied.

The Motion for Remittitur poses a more difficult question for the Court because there is no bright-line rule in Arkansas to apply when the court is faced with the issue of reducing a punitive damages judgment awarded by the jury. *Interstate Freeway Services, Inc. v. Houser*, 310 Ark. 302, 310, 835 S.W.2d 872 (1992). The only guidelines are that the jury should consider all attendant circumstances and determine an amount sufficient to deter and punish similar future conduct on the part of the tortfeasor and others. *Id.* Arkansas courts have traditionally stated that the award of punitive damages is a jury decision, and the court may not substitute its judgment for the jury's. *McNair v. McNair*, 316 Ark. 299, 308, 870 S.W.2d 756 (1994).

Before reducing a jury's award of punitive damages, the court must first measure the propriety of the award. As the *McNair* case pointed out, there are many standards of measurement that have been used in Arkansas, and some of the factors include: the extent of the wrong: the intent of the party committing the wrong; all the circumstances surrounding the wrong; the financial and social conditions of the erring party; and the amount sufficient to deter similar conduct. *Id.* at 307. Only after the court determines that the award is so great that it "shocks the conscience of the court" and appears to be the result of improper passion and prejudice will the punitive damages award be reduced. *Gipson v. Garrison*, 308 Ark. 344, 347, 824 S.W.2d 829 (1992).

The established case law in Arkansas must be read in context with the recent United States Supreme Court's decision in *BMW of North America, Inc. v. Ira Gore, Jr.*, No. 94-896 (U.S. May 20, 1996). In that case, a $2 million punitive damages award in an Alabama state court was held

to be a violation of the Due Process Clause of the Fourteenth Amendment because it was "grossly excessive." The Supreme Court stated that punitive damages may be imposed to further a legitimate State interest in deterring certain conduct, and that in most States the courts only require that the damages awarded be reasonably necessary to achieve that interest. *Id.* at 4338. However, when the amount of the punitive damages award in relation to the State's interests reaches the level of being "grossly excessive,", then it enters into the "zone of arbitrariness' and violates the Due Process Clause of the Fourteenth Amendment. *Id.*

In the case before this Court, the Defendant, a financial institution, loaned the Plaintiffs approximately $3 million for a speculative coal mining operation. The venture resulted in a loss, with interest, in excess of $7 million. The Plaintiffs' cause of actions arose from the Defendant's conduct in handling the loan and collecting the debt. The jury found that the Defendant's conduct was actionable and compensated the Plaintiffs for their actual damages. In addition, the jury awarded two of the Plaintiffs a combined amount of $10 million in punitive damages. This Court must now determine whether that amount is "grossly excessive" and "shocks the conscience of the court."

There is no question that the State of Arkansas has a right to protect its citizens from unfair loan handling and debt collection and has a legitimate interest in deterring such conduct in the future. However, *BMW*, while it stops short of creating a bright-line rule on the constitutional limits of punitive damages, seems to advocate some rational relationship between the State's interest in deterring certain conduct and the amount of punitive damages awarded. *Id.* at 4338. The facts of the case at bar are very complicated and limited, and the tortious conduct being deterred is equally as limited. For that reason, it appears to this Court that a $10

million award is not necessary to vindicate the State's interest in deterring that type of conduct.

The *BMW* case also points out that the issue of notice is a factor to consider in determining the proper measure of punitive damages. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 4339. It is this Court's view that neither this Defendant nor any other Arkansas financial institution had fair notice that the actions taken concerning this loan could possibly subject them to a $10 million penalty, and a punishment of that magnitude should not be imposed without fair notice.

While this Court is keenly aware that it should not invade the jury's province and substitute its own judgment in place of the jury's decision without good cause, the Court finds that after a careful consideration of the evidence produced at trial, the nature of the injury, the standing of all parties, and the State's interest in deterring similar conduct, the award of $10 million in punitive damages "shocks the conscience of the court" and is "grossly excessive" in relation to the State's interests. The Court finds that this is a violation of the Due Process Clause of the Fourteenth Amendment and warrants a reduction. Based on this determination, the amount of punitive damages awarded to Michael Walker is reduced to $1 million and the amount awarded to Aearth Development, Inc. is reduced to $2 million.

CONCLUSION

After careful consideration of the Defendant's post-trial motions, the Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial are both denied because the Court finds there was substantial evidence to

support the jury's verdict. The Motion for Remittitur is granted because the jury's award of $10 million in punitive damages "shocks the conscience of the court," and is grossly excessive and violates the Due Process Clause of the Fourteenth Amendment. The punitive damages amount awarded to Michael Walker is reduced to $1 million, and the amount awarded to Aearth Development, Inc. is reduced to $2 million.

IT IS SO ORDERED.

/s/ Chris Piazza
HONORABLE CHRIS PIAZZA

6-21-96
DATE

APPENDIX C

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION

NO. 90-56

MICHAEL WALKER, AEARTH DEVELOPMENT, INC.,
AEARTH PREPARATION, INC., AND
COAL PROCESSORS, A JOINT VENTURE
PLAINTIFFS

V.

FIRST COMMERCIAL BANK
DEFENDANT

JUDGMENT

[FILED; 96 MAY 20 AM 10:28; CAROLYN STALEY;
CIRCUIT-COUNTY CLERK]

On this day comes on for hearing, Plaintiffs' Motion for Judgment and Defendant's Supplemental Motion for Summary Judgment for Setoff or Recoupment. Upon the motions of the parties, the jury verdict, arguments and briefs of counsel, the Court finds:

1. On the 13th day of March, 1996, trial having begun on February 5, 1996, came on for hearing before the Court, the above-captioned case, the Plaintiff Walker appearing in person and as agent of the business plaintiffs all of whom were represented by their attorneys, Michael Burk, James Burk, and Kendell Black, and the Defendant appearing through its attorneys, Glenn W. Jones and John S. Cherry, and following the introduction of evidence, instructions from

the Court, and arguments from counsel, the jury retired and rendered the followed verdict:

> We the jury find for the Plaintiffs indicated below against the defendant, First Commercial Bank and assess damages as follows:
>
> (1) Michael W. Walker
> Compensatory $1,000,000
> Punitive $5,000,000
>
> (2) Aearth Development
> Compensatory $7,500,000
> Punitive $5,000,000
>
> (3) Coal Processors
> Compensatory $4,000,000
> Punitive $ 0

2. Based upon the jury verdict, the Court awards JUDGMENT for Plaintiffs as follows, subject to Defendant's judgment for setoff or recoupment set forth below:

(1) Michael W. Walker
Compensatory $1,000,000
Punitive $5,000,000

(2) Aearth Development
Compensatory $7,500,000
Punitive $5,000,000

(3) Coal Processors
Compensatory $4,000,000
Punitive $ 0

3. Plaintiffs' motion for Pre-judgment interest and attorney's fees should be and hereby is DENIED.

4. Defendant's Supplemental Motion for Summary Judgment for Setoff or Recoupment against Plaintiffs jointly and severally, including principal, interest and attorneys'

fees should be and hereby is GRANTED in all respects, except that the setoff or recoupment shall be applied pro-rata against the judgment for Plaintiffs. In the event the judgment for one or more of the Plaintiffs is reduced or dismissed, then Defendant's setoff or recoupment shall be applied jointly and severally to the judgment of the remaining Plaintiff or Plaintiffs.

IT IS THEREFORE ORDERED that Defendant have JUDGMENT FOR SETOFF OR RECOUPMENT against the Plaintiffs, jointly and severally, to be applied on a pro-rata basis in the sum of $7,310,169.05, plus additional interest thereon at the rate of $757.2581 per day from March 22, 1996, until the date of entry of this judgment.

IT IS FURTHER ORDERED, that the amount of the net judgment in favor of Plaintiffs shall accrue interest at the rate of ten percent (10%) per annum from the entry of this judgment.

IT IS SO ORDERED.

/s/ Chris Piazza
Hon. Chris Piazza
Pulaski County Circuit Judge

Dated: 5-20-96

APPROVED AS TO FORM:

THE BURK LAW FIRM
A Professional Corporation
711 San Antonio Street
Austin, Texas 78701
(512) 476-8350

By: _____
Michael G. Burk
Texas Bar No.: 03386500

Lead Counsel for Plaintiffs

WALKER & BLACK
1000 W. 3rd Street, Post Office Box 3780
Little Rock, AR 72203
(501) 376-2382

By: _____
Kendell R. Black
AR BIN 85101

Local and Co-counsel for Plaintiffs
ATTORNEYS FOR PLAINTIFFS

BARBER, McCASKILL, AMSLER, JONES & HALE, P.A.
2700 First Commercial Building
400 West Capitol Avenue
Little Rock, AR 72201-3414
(501) 372-6175

By: _____
Glenn W. Jones AR BIN 63028
John S. Cherry AR BIN 66012

ATTORNEYS FOR DEFENDANTS

APPENDIX D

SUPREME COURT OF ARKANSAS.

No. 92-1488.

Michael W. WALKER, Aearth Development, Inc.; Aearth Preparations, Inc.; and Coal Processors,
Appellants/Cross-Appellees,

v.

FIRST COMMERCIAL BANK, N.A.,
Appellee/Cross-Appellant.

July 18, 1994.

In lender liability action, the Chancery Court, Pulaski County, Annabelle Clinton Imber, Chancellor, denied borrowers' motion to return case to circuit court following transfer to Chancery Court based upon lender's allegation of equitable defense of setoff, and, after trial, held against borrowers on merits of lender liability claim. Borrowers appealed. The Supreme Court, Donald Price Chaney, Jr., Special Justice, held that: (1) lender's defense of equitable setoff was not exclusively cognizable in equity, and thus, transfer of case to Chancery Court from District Court based upon equitable defense wrongfully deprived borrowers of jury trial on lender liability claim, and (2) insolvency and bankruptcy of borrowers did not justify equity intervention since setoff was available as defense regardless of whether borrowers filed bankruptcy.

Reversed and remanded.

Michael G. Burk, Dallas, TX, Dana A. Reese, Little Rock, for appellants.

Glenn W. Jones, R. Kenny McCulloch, Little Rock, for appellee.

DONALD PRICE CHANEY, Jr., Special Justice.

This lender liability case involves many issues, including the pivotal issue of whether Appellants were wrongfully deprived of a jury trial. The Court finds that the transfer of this case from circuit to chancery court did wrongfully deprive the Appellants of their right to a jury trial. The Court need not address any other issues in view of the ruling on this dispositive issue. The Court finds that Appellants' violations of the rules for brief preparation were not flagrant and will not deprive them of having the merits of the case decided on appeal.

The Appellants filed a lender liability claim against First National Bank of Little Rock, the Appellee's predecessor in interest. The consolidated complaint alleged claims based on negligence, gross negligence, breach of fiduciary duty, breach of the common law and Arkansas Uniform Commercial Code duties of good faith and fair dealing, breach of contract, breach of implied joint venture interest, securities violations of joint venture agreement, conversion, negligent misrepresentation, fraud, fraudulent conspiracy, fraudulent misrepresentation, duress, tortious interference with business expectancy, violation of the Bank Holding Company Act, 12 U.S.C. §§ 1971- 1978, and the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c).

Appellants contended, among other things, that their coal mining business failed because Appellee insisted that George Locke be included as an owner and manager of Coal Processors when one of the other joint venture partners withdrew, and that Appellee failed to provide long term financing that

was promised. Appellants also contended that the Appellee transferred funds without authorization from an escrow account for coal sale proceeds to pay a loan owed to Dan Lasater, prompting a mining equipment supplier to repossess essential equipment and thus causing the failure of Appellants' coal mining business.

The Appellee filed an answer claiming an equitable setoff and recoupment for the amount of unpaid loans owed by Appellants. Based upon this allegation of an equitable defense, the circuit court transferred the case to chancery court over Appellants' objections. The chancery court denied Appellants' motion to return the case to circuit court. Following a trial that resulted in a voluminous forty-six volume record, the Chancellor ruled that the Appellants had standing and capacity to bring their claims, but held against the Appellants on the merits of their lender liability claim. This appeal followed.

In order for an action at law to be transferred to chancery to try an equitable defense, such equitable defense must be "exclusively cognizable in chancery" pursuant to Ark.Code Ann. § 16-57-106 (1987). There must be "peculiar equities" alleged in the pleadings or that exist in the proffered proof for a cause of action to be transferred to the chancery court for adjudication of an equitable setoff. Poultry Grower's, Inc. v. Westark Prod. Credit Ass'n, 246 Ark. 995, 440 S.W.2d 531 (1969). We have often said that equity has no jurisdiction where there is a complete and adequate remedy at law. Taylor's Marine, Inc. v. Waco Mfg., Inc., 302 Ark. 521, 792 S.W.2d 286 (1990).

We find here that Appellee's defense of equitable setoff was not exclusively cognizable in equity. Appellee's setoff defense sought to offset against any recovery awarded Appellants the amount of unpaid loans owed by Appellants to Appellee under promissory notes that were executed

during the course of the parties' banking relationship. The amount of such unpaid loans was a liquidated sum certain, and Appellee filed a claim for such amount in the respective bankruptcy cases filed by Appellants. Such liquidated sum owed by Appellants to Appellee would be cognizable at law and could be considered by the circuit court pursuant to Ark.Code Ann. § 16-63-206 (1987), which provides for setoff as follows:

> (a) A setoff may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort.
>
> * * * *
>
> (d) When any plaintiff shall be indebted to a defendant in any bond, bill, note, contract, book account, or other liquidated demand and the defendant fails to setoff the debt against the plaintiff's demand, the defendant shall be forever barred from recovering costs in any suit which he may thereafter institute upon any such bond, bill, note, contract, book account, or other liquidated demand.

Id. § 16-63-206(a) and (d).

This statute is broad enough to include both setoff and recoupment, a distinction that this Court has not made previously. In First State Bank of Crossett v. Phillips, 13 Ark.App. 157, 681 S.W.2d 408 (1984), the court defined recoupment as "the right to keep back rightfully some part owed so as to reduce or diminish the total sum due," and noted that the counterclaim was in the nature of recoupment where it arose from the same loan transaction giving rise to the foreclosure action.

Appellee contends that the insolvency and bankruptcy of the Appellants justifies equity intervention, and that 11 U.S.C. § 524(a) would prohibit Appellee's offsetting its

liquidated debt. However, the Appellee asked for and received an order from the bankruptcy court relaxing the automatic stay as to the corporate Appellants, which removed any impediment to the assertion of Appellee's recoupment or setoff at law. Furthermore, the Ninth Circuit Court of Appeals has held that 11 U.S.C. § 553 allows setoffs in bankruptcy to the same extent they are allowed under state law. In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269 (9th Cir.1992). The Court of Appeals noted that a setoff is allowed as a defense to a claim brought by a bankruptcy debtor against a creditor, and that the creditor can only claim an amount large enough to offset its debt.

In Westinghouse Electric Corp. v. Fidelity & Deposit Co., 63 B.R. 18, 21 (E.D.Pa.1986), the court cited Collier on Bankruptcy, § 553.03, as follows:

> Under the legal and equitable principles of setoff, . . . the mutual debt and claim contemplated are generally those arising from different transactions . . . Recoupment, on the other hand, is the setting up of a demand arising from the same transaction as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim.

Id. [emphasis in original].

The court found that the recoupment defense was not affected by the filing of bankruptcy. A similar view is expressed in 8A C.J.S. Bankruptcy § 164 where it is stated that the setoff need not arise in the same transaction, and that "the doctrine of recoupment is available when the debt arises from the same transaction."

Our statute, Ark.Code Ann § 16-63-206 (1987), is broad enough to include both setoff and recoupment, which is available as a defense to Appellee regardless of whether Appellants have filed bankruptcy or been discharged in

bankruptcy. There is no peculiar equity under these circumstances that would mandate a transfer to chancery court. The defense of setoff or recoupment is available in the action at law for the liquidated sum owed by Appellants to Appellee for the unpaid loans which arose from the same lending relationship between the parties that gave rise to Appellant's lender liability claim.

We hold that the Appellants were wrongfully deprived of a jury trial on their lender liability claim as guaranteed to them by Article 2, Section 7 of the Constitution of Arkansas, which provides as follows:

> The right of trial by jury shall remain inviolate and shall extend to all cases at law, without regard to the amount in controversy.

The right to jury trial is a fundamental constitutional right that is protected by the Constitution of Arkansas, and procedural rules will not be applied to diminish the right to a jury trial. Bussey v. Bank of Malvern, 270 Ark. 37, 603 S.W.2d 426 (Ark.App.1980).

A defendant may not assert an equitable counterclaim merely to avail himself of chancery court jurisdiction and deprive the plaintiff of the right to a trial by jury. Axley v. Hammock, 185 Ark. 939, 50 S.W.2d 608 (1932). It is only where an equitable defense is exclusively cognizable in equity that transfer to chancery should be authorized, which is not present here. For this reason, this case is reversed and remanded to the chancery court with instructions to transfer the case to circuit court for further proceedings.

Reversed and remanded.

BROWN, J., not participating.

APPENDIX E

[Letterhead of—Office of the Clerk, Supreme Court of the State of Arkansas, Arkansas Court of Appeals, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201]

June 4, 1998

Michael G. Burk
Attorney at Law
The Bremond House
711 San Antonio Street
Austin, Texas 78701

RE: 96 01495 FIRST COMMERCIAL BANK v. MICHAEL WALKER ET AL.

Dear Mr. Burk:

The Arkansas Supreme Court made the following order today in the above styled case:

> "Appellee/cross-appellant Walker's petition for rehearing is denied. Appellees/cross-appellants Aearth Corporations and Coal Processors' petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh

cc: Kendell R. Black
James E. Burk
Philip S. Anderson
Glenn W. Jones
John S. Cherry
James Leon Holmes
Joseph Franklin Kolb
Carolyn Staley, Clerk
(#90-56)

APPENDIX F

[Letterhead of—Office of the Clerk, Supreme Court of the State of Arkansas, Arkansas Court of Appeals, Justice Building, 625 Marshall Street, Little Rock, AR 72201]

September 19, 1994

Glenn W. Jones
and R. Kenny McCulloch
Attorneys at Law
2700 Commercial Bldg.
400 W. Capitol Ave.
Little Rock, AR 72201

RE: 92 01488 MICHAEL WALKER ET AL v. FIRST COMMERCIAL BANK

Gentlemen:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied.
Brown, J., not participaing."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh

cc: Dana A. Reese
Michael G. Burk
Steve Sipes, Clerk
(#90-2292)

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

No. 96-1495

FIRST COMMERCIAL BANK, N.A.
APPELLANT/CROSS-APPELLEE

VS.

MICHAEL W. WALKER, AEARTH DEVELOPMENT, INC., AEARTH PREPARATION, INC., and COAL PROCESSORS, A JOINT VENTURE
APPELLEES/CROSS-APPELLANTS

APPELLEE/CROSS-APPELLANT WALKER'S PETITION FOR REHEARING

[RECEIVED; SUPREME CT./CT. OF APPEALS; CLERK'S OFFICE; 1998 MAY 18 AM 9:28; LESLIE W. STEEN, CLERK]

Come Appellee/Cross-Appellant Walker and pursuant to Rule 2-3 of the Arkansas Rules of Supreme Court moves this Court for re-hearing on the following grounds:

Walker Has Standing to Pursue His Individual Claims and Claims as Co-Maker/Guarantor

1. The Court bases its April 1998 Opinion holding that Walker lacks standing as an individual, co-maker, and guarantor entirely on the incorrect conclusion that Walker is suing only of behalf of the corporation and not on his own behalf (an assertion contrary to the Plaintiffs'/Appellees'/Cross-Appellants' Amended Complaint, the facts, and the jury's findings). For the proposition that Walker lacks standing as an individual, the Court cites 19 C.J.S. *Corporations* § 629, at 277 which states "A corporate officer has no

individual right of action against a third party for alleged wrongs *inflicted on the corporation.*" (emphasis added). The Appellees do not disagree with that statement, but it is not applicable to our case. Based on the pleadings, evidence admitted, and the facts found by the jury, Walker has suffered and pleaded severe individual damages completely distinct from the Aearth corporations and Coal Processors, due to the tortious acts of the Bank, including without limitation, fraudulently inducing Walker to sign individually millions of dollars worth of notes as a co-maker then claiming he is liable on these notes, and therefore Walker clearly has standing as to his individual tort claims, moreover, the Bank improperly asked for and by the Circuit Court was given a setoff against Walker's jury award for those notes he signed.

2. The Court states in its April 30, 1998 Opinion that Walker (who signed almost every note as a co-maker *and* guarantor) "acted only as a guarantor, even on those notes that he signed individually [as co-maker] . . . " April 30, 1998 Opinion, at 11 (bracketed phrase supplied). Further the Court states that Walker does not have standing to sue as a co-maker "because Aearth business entities were the principal borrowers and sole recipients of the borrowed funds." April 30, 1998 Opinion, at 11. Therefore, the Court has created a new basis to deny standing for co-makers and individual liable note signers based on a unique doctrine of a "not the principal borrower" exception which prevents a co-maker from having standing to sue either for contractual and/or tort claims associated with the signing of a note, if that co-maker is not the "principal borrower" (a term which the Court has failed to define). The Appellees have not seen any authority, nor does the Court cite any authority for this new doctrine. In fact the Court fails to cite any cases regarding the standing issue for a co-maker. Moreover, such a "not the principal borrower" exception denying standing to

co-makers and individual note signers would be a violation of the due process and equal protection provisions of the 14th Amendment to the U.S. Constitution.

3. The Court cites the *Taggart* for its proposition that Walker lacks standing as a co-maker, on the erroneous premise that Walker was just a guarantor, apparently believing that somehow the reasoning applies in this case. *Taggart & Taggart Seed v. First Tenn. Bank Nat'l Ass'n*, 684 F.Supp. 230 (E.D. Ark. 1988). This is an erroneous analysis. In *Taggart* the court stated, "The corporate entity . . . is the real party in interest, not the guarantors who no longer have even a contingent liability on the note and who do not allege that they were ever called on for its repayment." *Id.*, at 235. Therefore, the *Taggart* court determined that the guarantors in that case suffered no damages distinct from the corporation. As shown by the evidence cited above the facts as to Walker here are different. Unlike the facts in *Taggart*, Walker signed individually and therefore was personally liable on almost every loan, including the loans which the jury found the Bank had fraudulently induced Walker into signing.

4. The Court also cites the *Schmidt v. McIlroy Bank & Trust*, 811 S.W.2d 281 (1991) case stating that the appellants in that case "made a similar argument that they, as guarantors, should have standing to pursue lender-liability claims *on behalf of the corporate entity*." April 30, 1998 Opinion, at 10-11 (emphasis added). This again incorrectly assumes that Walker is suing merely "on behalf of the corporate entity" a position contrary to the evidence and pleadings. In fact this Court held in *Schmidt* that "A personal guaranty may be a basis upon which suit can be brought. There is no question about that." *Schmidt*, at 282. This Court in *Schmidt* went on to affirm the summary judgment against the guarantor/appellants because they "had not *pleaded* any individual causes of action . . . ." *Id.*, at

284 (emphasis added). Accordingly this Court itself in *Schmidt* has determined Walker may sue merely as a guarantor.

5. There is no question that Walker has clearly pleaded individual causes of action including without limitation: "The Bank intended the Walker and the Aearth Entities rely to their detriment and they did detrimentally and reasonably rely on the Bank's promise, which the Bank knew was false when made . . . ." (Plaintiffs' Amended Complaint, as 39; T713-67); and "At a meeting on April 29, 1982, Joe Ford informed Walker that unless he agreed to surrender controlling interest of Aearth to Locke, the bank would see to it that Walker 'would never mine another ton of coal'" (Plaintiffs' Amended Complaint; A. 10; T. 729-30). Walker without question proved to the jury his individual causes of action and the following unique and personal damages, without limitation: he has been called on to pay millions of dollars worth of notes, in fact in the Bank's Complaint to Revoke Discharge of Walker's personal bankruptcy, it alleged Walker individually, as one of the makers of the notes, personally owed $2,046,859.16 plus interest on the notes (PX 34.17; A. 875; T. 3752); personal liability for almost $60,000 (as of 1990 but way more now with penalties and interest) of federal unemployment taxes which were personally addressed to and sent to Walker in his individual capacity in the context of joint and several liability with the other business entity Plaintiffs/Appellees (PX 36.6; S.A. 23; T. 4032); the Department of Pollution Control & Ecology (DPCE) barred Walker, or any corporation in which Walker might own more than 9% interest, from obtaining mining permits or from operating a mine anywhere in the United States (PX 36.7; S.A. 23-4; T.4032) for the rest of Walker's life; and personal liability for DPCE fines and penalties totaling over $288,000 (PX 36.7; S.A. 23-4; T. 4032). Most, if not all, of these damages are of such a nature that

as of the 1996 trial no entity or individual but Walker would have standing to sue to recover these damages. These liabilities and damages were testified to by Walker based on IRS and DPCE documents addressed to him personally (T.3241-4517), and based on the testimony of DPCE personnel (T.7286-7371). The Bank presented no controverting evidence, has not claimed it did, and has not brought any to the Circuit Court's or this Court's attention. To the extent this court has determined that Walker has no unique and personal damages, this Court is effectively and erroneously substituting its "findings of fact" for those of the jury which actually sat through this very involved six week trial. *St. Louis Southwestern R.R. v. Gridden*, 321 Ark. 84; 900 S.W.2d 530 (1995); *Butler Manufacturing Co. v. Hughes,* 292 Ark. 198, 729 S.W.2d 142 (1987).

6. The Court's April 30, 1998 Opinion cannot be reconciled with current Arkansas and U.S. law. Moreover, it creates an anomalous and unconstitutional result. In its April 30, 1998 Opinion, the Court admits, "A guarantor is one who makes a contract, which is *distinct* from the principal obligation, to be collaterally liable to the creditor if the principal debtor fails to perform." April 30, 1998 Opinion, at 10 (emphasis added). Appellee Walker feels confident that this Court would not deny that under current Arkansas law a co-maker/guarantor can have personal tort and contractual liability as to this "distinct" obligation, therefore, the creditor has standing to sue the co-maker/guarantor for tort and/or contractual claims. Therefore, this Court has held, in its April 30, 1998 Opinion, that a co-maker/guarantor has all the obligations and liabilities associated with signing a note, but does not have the commensurate benefits, including standing to sue the creditor for tort and/or contractual claims for disputes arising from the signing of a note (this cannot be the result this Court intended). If the Court's April 30th Opinion stands and Walker, who is a co-

maker/guarantor, is denied the ability to sue and recover, on the erroneous basis that he lacks standing, this will violate the Equal Protection and Due Process Clauses of the 14th Amendment of the United States Constitution, and additionally constitute an impermissible taking of his property (his claims in this lawsuit) which will violates the 5th and 14th Amendments of the U.S. Constitution and Article 2, §§21 and 22 of the Constitution of the State of Arkansas.

This Court's Suggestion That Judicial Estoppel May Apply to Michael Walker or Other Appellees is Not Supported by the Law or the Record in this Case

7. In the final section of its opinion, this Court makes reference to but does not decide the issue related to the Bank's claim that judicial estoppel applies against Appellees in this case. This same argument was advanced by the Bank in both of the lower courts and rejected. It was also before this Court in the 1992-1994 first appeal and was not accepted by this Court. The Bank's argument is based solely upon the fact that Walker listed the claim in his bankruptcy petition as having no value (A.4; T.233-240) (PX 34.15; A.874-875; T. 3733); the Aearth and Coal Processors did not list the claim in their bankruptcies (PX 34.5, A. 873, T. 3735-3753; PX 34.8, A. 873, T. 3736-3753; PX 34.11, A. 873-874, T. 3736-3753; PX 34.10, A. 873, T. 3736-3753) so *ipso facto* they cannot be judicially estopped from prosecuting their claims in this lawsuit. Obviously, Walker's claim, at the time he noted its potential existence in his bankruptcy, was unliquidated, no suit on it had been filed and it was of speculative value at best. Not being a commercial trial lawyer and having retained no lawyer to prosecute the suit at the suit at that time, Walker was not competent to determine any value for that then potential lawsuit.

8. The doctrine of judicial estoppel simply bars a litigant from taking inconsistent positions in the same litigation

involving the same parties. *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991), cert. denied, 113 S.Ct 96 (1992) cited in *Robertson Oil Company, Inc. v. Phillips Petroleum Company*, 14 F. 3rd 360, 373 n. 11 (8th Cir. 1993). The majority of the circuits have held that judicial estoppel does not apply unless the inconsistent statement was actually relied upon by the courts in earlier litigation. *Id.*, at 373 n.11. There is no evidence that the bankruptcy court relied upon Walker's value, and the Bank has cited none.

9. In Arkansas, little has been stated concerning judicial estoppel. In the case of *Daily v. City of Little Rock*, 818 S.W.2d 259 (1991), the court explained the doctrine of judicial estoppel as follows:

> Judicial estoppel is a doctrine whereby a party may be prevented from taking inconsistent positions in successive cases with the same adversary, *Muncrief v. Green*, 251 Ark. 580, 473 S.W.2d 907 (1971). The doctrine has been said to be one of vague application, but it is commonly required that the parties be the same, and that the same questions be involved. *Rinke v. Weedman*, 232 Ark. 900, 341 S.W.2d 44 (1960).

10. In *In re Air One, Inc.*, 75 B.R. 998, 1002 (Bankr. E.D. Mo. 1987) (*citing Total Petroleum, Inc. v. Davis*, 822 F.2d 734, at 737 n. 6 (8th Cir. 1987)) it was stated that the doctrine of judicial estoppel has doubtful viability in this [8th Circuit] judicial circuit.

11. The *Total Petroleum* court stated:

> "The purpose of judicial estoppel is to protect the integrity of the judicial process. As we read the case law, this is tantamount to a knowing representation to or even fraud on the court. Further, the doctrine is not followed in a majority of jurisdictions, partly because of its vague definition and partly because of a perceived

conflict with the rule allowing parties to plead alternative legal theories.'' (Citations omitted).

12. Apparently both the chancery and circuit courts were satisfied that the integrity of the judicial system was protected since they rejected the Bank's assertion of judicial estoppel as did this Court in the prior case. There were ample reasons for their rejection of the Bank's arguments — the Bank failed to satisfy any of the elements necessary to apply judicial estoppel. To wit, the Bank was not even a party to the bankruptcy proceedings of either the Aearth entities or Walker nor was there any finding by the bankruptcy court upon which the Bank can assert any inconsistency and the bankruptcy proceedings are not the ''same litigation''.

13. Notwithstanding the fact that the Bank has not met any of the essential elements of judicial estoppel, the Bank is nevertheless barred from asserting the doctrine because its bankruptcy counsel, by his own admission, intentionally failed to question Walker at the Rule 2004 hearing concerning any of the details of the lender liability claim although he had ample opportunity because it thought Walker's zero value statement had no significance. (A.617-618; T.6994-6997). The Bank according to its attorney thought the zero value Walker gave was insignificant which means the Bank could not have relied on that value. Reliance is a critical element of judicial estoppel. During the bankruptcy proceedings, the Bank was fully on notice of the possibility of claims from Walker and the Aearth entities and chose not to investigate further the nature of those claims. The Bank even sought, at one time in the bankruptcy proceedings, to set aside Walker's discharge based upon the Bank's assertion in its motion that the claims held by the bankruptcy estate against the Bank should have been valued at $60MM. (PX 34.17; A.875; T.3752).

14. If this Court revisits the issue of standing and concludes that Federal law applies, as contended by the plaintiffs, then this Court should not apply the doctrine of judicial estoppel to bar any claims by the plaintiffs because, as demonstrated above, the doctrine, to the extent it has any viability in this circuit, is inapplicable upon the facts of this case.

Court's 4/30/98 Opinion Contradicts its 7/18/94 Opinion as Matter of Law and Violates the Law of Case Doctrine

15. Did this Court in its July 1994 Opinion necessarily and as a matter of law find capacity/standing for all the Appellees before it could even reach the issue of whether, as it ultimately held, all the Appellees were entitled to a jury trial? If the Court did make this finding, either explicitly, or by necessary implication as a matter of law, then the doctrine of the law of the case would be violated if the Court's April 1998 Opinion stands. The doctrine of the law of the case prevents an issue raised and decided in a first appeal from being raised in a subsequent appeal. *Bennett v. State*, 308 Ark. 393, 825 S.W. 2d 560 (1992). The Court's April 30, 1998 Opinion holds that this Court did not *expressly* rule on the capacity/standing issue and therefore did not reach it. That holding is erroneous based on the prior decisions of this Court. The law of the case doctrine applies even when an issue was resolved *implicitly* despite the lack of any explicit statement. *Foreman v. State*, 328 Ark. 583, 945 S.W. 2d 926, 930 (Ark. 1997).

16. At pages five and six of this Court's July 18, 1994 Opinion in No. 92-1488, the prior appeal in this case, this Court stated:

> We hold that Appellants were wrongfully deprived of a jury trial on their lender liability claims as guaranteed to them by Article 2, Section 7 of the *Constitution of Arkansas*, which provides as follows: . . . For this

reason, this case is reversed and remanded to the chancery court with instructions to transfer the case to circuit court for further proceedings.

17. Litigants who lack capacity or standing have no right to a jury trial. Capacity and standing are threshold jurisdictional issues *sine qua non* that must be decided before deciding the right to a jury trial. This Supreme Court has held that capacity/standing is a jurisdictional matter. *Jones v. American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387, 390 (Ark. 1987), citing *Fausett and Company, Inc. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153, 154 (1985). Further, this Court has explicitly held that, "The right to a jury trial presupposes the party is properly within the Court's jurisdiction." *Lineberry v. State*, 322 Ark. 84, 907 S.W. 2d 705, 706 (Ark. 1995). Based on its own precedents cited above, this Court implicitly and necessarily, as a matter of law, decided the capacity/standing issue in its 1994 Opinion in the process of holding, as it expressly did in the portion of the 1994 Opinion quoted above, that all the Appellees were entitled to a jury trial. Therefore, this Court's 1998 Opinion cannot stand.

18. The Court's 1998 Opinion effectively causes fragmented and inconsistent appellate results in this same case. This Court has held that such fragmented and inconsistent appellate results impermissible: "The law of the case doctrine exists to prevent fragmented appeals of this nature, particularly when the order [matter] at issue was part of the record presented to the court in the appellant's first appeal." *McDonald's Corp. v. Hawkins*, 319 Ark. 1, 894 S.W. 2d 136, 137 (Ark. 1995).

19. The United States Supreme Court has defined the standard for the law of the case doctrine to prohibit contrary opinions in the same case except where manifest injustice would result. *Montana v. United States*, 99 S. Ct. 970, 973

(1979). This Court's definition in *McDonald's Corp., supra*, is consistent with the definition in *Montana, supra.*, although the latter is more elaborate. In *Montana*, the U.S. Supreme Court said: "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id. at 973-74.* The U.S. Supreme Court put the issue more succinctly in a later opinion: "We hold that [the issue before us in this case] should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Arizona v. California*, 103 S.Ct. 1382, 1391 (1983). The issue of capacity/standing was fully briefed and before this Court twice during the 1992-1994 earlier appeal (Walker I): once in the briefing considered by the Court before its July 1994 Opinion and again as a principal basis for the Bank's Motion for Rehearing thereafter which was denied. The standing issue was squarely presented on both occasions and was a necessary predicate without which this Court could not have reached and decided the constitutional right to a jury trial. The Court's 1998 Opinion relitigates and contrarily decides the standing issue as a matter of this Court's own precedential law; it destroys repose on this matter; it establishes inconsistent decisions of this Court; and it impermissibly nullifies the correct grant of the Arkansas and U.S. constitutional right to a jury trial given to Appellees in 1994 by this Court.

20. Allowing this Court's April 30, 1998 Opinion to stand in clear contravention of this Court's July 18, 1994 Opinion would work a manifest injustice. To wit, the effect of the 1998 Opinion is that this lawsuit, which is an asset of the Appellees, cannot be used or pursued by anyone — what greater manifest injustice could there be? The Court's 1998

Opinion as to standing and capacity also creates yet more manifest injustice of a constitutional nature: a de facto denial of Appellees' right to a jury trial protected under Art. 2, Section 7 of the Arkansas Constitution and the 7th Amendment of the U.S. Constitution since it takes away after the fact the right to jury trial which was given and exercised pursuant to its 1994 Opinion.

Prayer

WHEREFORE, for the reasons and based on the authorities set forth above, the Court's erroneous April 30, 1998 Opinion should be withdrawn or reversed, and capacity and/or standing reaffirmed for all the Appellees consistent with this Court's July 18, 1994 Opinion, and Appellants' entire appeal denial as meritless, and the Circuit Court's remittitur order of June 21, 1996 reversed, and Appellees' Cross-Appeal granted in its entirety, and the original May 20, 1996 Judgment of the circuit court reinstated but without any remittitur, setoff, interest or attorney's fees (which items were erroneously awarded by the Circuit Court and not by the jury) being awarded to the Bank, i.e., with the total reinstatement of the $22.5 million verdict of March 13, 1996 as receptively awarded to Appellees/Cross-Appellants by the jury. In the alternative, Appellees/Cross-Appellants pray for a rehearing on the issues set forth herein. Appellees/Cross-Appellants further pray for such other and further relief as to which Appellees/Cross-Appellants may be entitled.

Respectfully submitted,

BURK LAW FIRM (TX)
A Professional Corporation
The Bremond House
711 San Antonio Street
Austin, Texas 78701
Phone: (512) 476-8350
Fax: (512) 476-8360

By: /s/ Michael G. Burk
Michael G. Burk
Texas Bar No. 03386500

Lead Counsel for Appellees/
Cross-Appellants

BURK LAW FIRM (DC)
1818 N Street, N.W., Suite 701
Washington, D.C. 20036-2406
Phone: (202) 966-4466
Fax: (202) 966-6441

James E. Burk
District Columbia Bar No. 187963

Co-Counsel for
Appellees/Cross-Appellants

WALKER & BLACK
1000 W. 3rd St., P O. Box 2780
Little Rock, Arkansas 72203
Phone: (501) 376-2382
Fax: (501) 376-3352

Kendall R. Black
Arkansas Bar No. 85101

Co-Counsel and Local Counsel
for Appellees/Cross-Appellants

CERTIFICATE OF MERIT

The undersigned attorney for Appellee/Cross-Appellant Walker respectfully certifies that this Appellee/Cross-Appellant Walker's Petition for Rehearing is made in the interests of justice, equal protection of the law and due process, and with a good faith belief in the merits of the arguments contained herein based on applicable Arkansas and federal law, and certifies that it is not made for the purposes of delay.

/s/ Michael G. Burk
Michael G. Burk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served by receipted hand-delivery on the following counsel of record on this 18th day of May, 1998.

Mr. Glenn W. Jones
Barber, McCaskill, Amsler, Jones & Hale, P.A.
2700 First Commercial Building
400 West Capitol Ave.
Little Rock, AR 72201

Mr. Phillip Anderson
Williams & Anderson
111 Center Street
22nd Floor
Little Rock, Arkansas 72201

/s/ Michael G. Burk
Michael G. Burk

APPENDIX H

IN THE SUPREME COURT OF ARKANSAS

No. 96-1495

FIRST COMMERCIAL BANK, N.A.
APPELLANT/CROSS-APPELLEE

VS.

MICHAEL W. WALKER, AEARTH DEVELOPMENT, INC., AEARTH PREPARATION, INC. and COAL PROCESSORS, A JOINT VENTURE
APPELLEES/CROSS-APPELLANTS

APPELLEE/CROSS-APPELLANTS AEARTH CORPORATIONS' AND COAL PROCESSORS' PETITION FOR REHEARING

[RECEIVED; SUPREME CT./CT. OF APPEALS; CLERK'S OFFICE; 1998 MAY 18 AM 9:29; LESLIE W. STEEN, CLERK]

Come Appellees/Cross-Appellants the Aearth Development, Inc. (hereinafter "Aearth") and its wholly owned subsidiary Aearth Preparation, Inc. and Coal Processors and pursuant to Rule 2-3 of the Arkansas Rules of Supreme Court move this Court for re-hearing on the following grounds:

Court's 4/30/98 Opinion Contradicts its 7/18/94 Opinion as Matter of Law and Violates the Law of the Case Doctrine

1. Did this Court in its July 1994 Opinion necessarily and as a matter of law find capacity/standing for all the Appellees before it could even reach the issue of whether, as it ultimately held, all the Appellees were entitled to a jury trial? If the Court did make this finding, either explicitly, or by necessary implication as a matter of law, then the doc-

trine of the law of the case would be violated if the Court's April 1998 Opinion stands. The doctrine of the law of the case prevents an issue raised and decided in a first appeal from being raised in a subsequent appeal. *Bennett v. State*, 308 Ark. 393, 825 S.W. 2d 560 (1992). The Court's April 30, 1998 Opinion holds that this Court did not *expressly* rule on the capacity/standing issue and therefore did not reach it. That holding is erroneous based on the prior decisions of this Court. The law of the case doctrine applies even when an issue was resolved *implicitly* despite the lack of any explicit statement. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926, 930 (Ark. 1997).

2. At pages five and six of this Court's July 18, 1994 Opinion in No. 92-1488, the prior appeal in this case, this Court stated:

> We hold that Appellants were wrongfully deprived of a jury trial on their lender liability claims as guaranteed to them by Article 2, Section 7 of the *Constitution of Arkansas*, which provides as follows: . . . For this reason, this case is reversed and remanded to the chancery court with instructions to transfer the case to circuit court for further proceedings.

3. Litigants who lack capacity or standing have no right to a jury trial. Capacity and standing are threshold jurisdictional issues *sine qua non* that must be decided before deciding the right to a jury trial. This Supreme Court has held that capacity/standing is a jurisdictional matter. *Jones v. American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387, 390 (Ark. 1987), citing *Fausett and Company, Inc. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153, 154 (1985). Further, this Court has explicitly held that, "The right to a jury trial presupposes the party is properly within the Court's jurisdiction." *Lineberry v. State*, 322 Ark. 84, 907 S.W. 2d 705, 706 (Ark. 1995). Based on its own precedents cited

above, this Court implicitly and necessarily, as a matter of law, decided the capacity/standing issue in its 1994 Opinion in the process of holding, as it expressly did in the portion of the 1994 Opinion quoted above, that all the Appellees were entitled to a jury trial. Therefore, this Court's 1998 Opinion cannot stand.

4. The Court's 1998 Opinion effectively causes fragmented and inconsistent appellate results in this same case. This Court has held that such fragmented and inconsistent appellate results impermissible: "The law of the case doctrine exists to prevent fragmented appeals of this nature, particularly when the order [matter] at issue was part of the record presented to the court in the appellant's first appeal." *McDonald's Corp. v. Hawkins*, 319 Ark. 1, 894 S.W. 2d 136, 137 (Ark. 1995).

5. The United States Supreme Court has defined the standard for the law of the case doctrine to prohibit contrary opinions in the same case except where manifest injustice would result. *Montana v. United States*, 99 S. Ct. 970, 973 (1979). This Court's definition in *McDonald's Corp., supra*, is consistent with the definition in *Montana, supra.*, although the latter is more elaborate. In *Montana*, the U.S. Supreme Court said: "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id. at 973-74.* The U.S. Supreme Court put the issue more succinctly in a later opinion: "We hold that [the issue before us in this case] should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Arizona v. California*, 103 S.Ct. 1382, 1391 (1983). The issue of capacity/standing was fully briefed and before this Court twice during the 1992-

1994 earlier appeal (Walker I): once in the briefing considered by the Court before its July 1994 Opinion and again as a principal basis for the Bank's Motion for Rehearing thereafter which was denied. The standing issue was squarely presented on both occasions and was a necessary predicate without which this Court could not have reached and decided the constitutional right to a jury trial. The Court's 1998 Opinion relitigates and contrarily decides the standing issue as a matter of this Court's own precedential law; it destroys repose on this matter; it establishes inconsistent decisions of this Court; and it impermissibly nullifies the correct grant of the Arkansas and U.S. constitutional right to a jury trial given to Appellees in 1994 by this Court.

6. Allowing this Court's April 30, 1998 Opinion to stand in clear contravention of this Court's July 18, 1994 Opinion would work a manifest injustice. To wit, the effect of the 1998 Opinion is that this lawsuit, which is an asset of the Appellees, cannot be used or pursued by anyone — what greater manifest injustice could there be? The Court's 1998 Opinion as to standing and capacity also creates yet more manifest injustice of a constitutional nature: a de facto denial of Appellees' right to a jury trial protected under Art. 2, Section 7 of the Arkansas Constitution and the 7th Amendment of the U.S. Constitution since it takes away after the fact the right to jury trial which was given and exercised pursuant to its 1994 Opinion.

Federal Bankruptcy Law Pre-empts Arkansas Law Voiding Corporate Forfeitures Thereby Maintaining Aearth Corporate Standing

7. The Court's 1998 Opinion, in which it dismisses this case, is based on the erroneous premise that the two Aearth corporations' charters were legally forfeited in 1984 and that the state's administrative actions in revoking those charters were valid. The Court's holding was erroneous in that the

putative acts of forfeiture took place while the Aearth corporations were in bankruptcy while the automatic stay was in force. Consequently, federal law controls and supersedes all state law to the contrary. Any alleged forfeiture took place in violation of the automatic stay and is void meaning that the Aearth corporations have never lost capacity to bring and prosecute this action.

8. A controlling 8th Circuit case explicitly holds that a state may not commence an administrative proceeding, such as forfeiture of a charter, after commencement of bankruptcy, except to enforce a governmental unit's police or regulatory power, and specifically holds that administrative proceedings that further a state's pecuniary interests (e.g., collection of franchise taxes) may not be commenced after the stay is in place. *State of Missouri v. U.S. Bankruptcy Court for the E. D. Arkansas,* 647 F. 2d 768, 776 (8th Cir. 1981) *cert. denied*, 102 S. Ct. 1035 (1982); *accord In re: Reserves Development Corp.*, 821 F. 2d 520, 521 (8th Cir. 1987) (state collecting wage claims not an exercise of police power and state not exempt from automatic stay). The State's putative forfeiture action was void *ab initio* as a violation of the automatic stay meaning the closing of the Aearth corporations' bankruptcies did not render legal or effective the illegal forfeiture done while the stay was in force. *Carpio v. Smith*, 213 B.R. 744, 747-749 (W.D. Mo. 1997) (*citing inter alia Parker v. Bain*, 68 F. 3d 1131 (9th Cir. 1995)); *accord Schwartz v. Schwartz*, 954 F. 2d 569, 571-572 (9th Cir. 1991) (all these cases hold that violations of the automatic stay are void, not voidable; *Carpio* and *Schwartz* both note this is the view of a majority of the federal circuits including the 8th).

9. Directly on point is a 9th Circuit bankruptcy court case involving an alleged state revocation of corporate charter for nonpayment of franchise taxes which cites *Missouri, supra*, the 8th Circuit case, for its authority. This 9th Circuit

bankruptcy case holds that such an attempted revocation by the state during bankruptcy without the stay being lifted is void and leaves the corporation legally intact as though never suspended. *In re: Golden Plan of California, Inc., et al.*, 37 B.R.167, 170 (E.D. Calif. 1984) (citing at fn. 2, p. 170, *Missouri, supra*). In another case from the 8th Circuit, the court held that Congress under § 362 (a)(1) clearly intended the automatic stay in bankruptcy to apply broadly to bar any governmental administrative proceedings including, e.g., a license revocation. *In re: National Cattle Congress, Inc.*, 179 B.R. 588, 593 (N.D. Iowa 1995); *accord Missouri, supra.*

10. It is undisputed in the case at bar that the State of Arkansas sought during the bankruptcy of the two Aearth corporations to impermissibly assert a pecuniary interest in administering its franchise tax collections through an administrative proceeding by attempting to forfeit their charters for nonpayment without lifting the stay. *Missouri, supra, at 776.* The two Aearth corporations were, therefore, never forfeited and never ceased to exist legally either before or during this lawsuit. These two Aearth corporations have existed throughout and continue to exist as live corporations as they did at the time the suit was originally filed. As a matter of pre-eminent federal bankruptcy law, these two Aearth corporations have never lacked capacity or standing, thereby rendering this Court's 1998 Opinion erroneous.

11. The cases relied upon by the Court in its April 1998 Opinion to deny capacity/standing to the two Aearth corporations, i.e., *Sulphur Springs Recreational Park, Inc. v. City of Camden*, 247 Ark. 713, 447 S.W. 2d 844 (1969), and *Schmidt v. McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W. 2d 281 (Ark.1991), are facially inapposite for one conclusive reason: these two cases do not involve parties or corporations like the Aearth corporations in bankruptcy as this case does and, recognizing the pre-emptive effect of federal

bankruptcy law, the Chancery and Circuit courts which have previously looked at these issues have properly upheld capacity and standing for all the Appellees/Cross-Appellants owing to their status in bankruptcy at the time of the alleged forfeiture.

12. In the case of *In re: Russell* (sometimes also cited as *Gibson v. Dennis*) 123 B.R. 48 (Bankr. W.D. Ark. 1990) at 50, fn. 2, the bankruptcy court finds standing to sue and be sued for corporations in bankruptcy whose charters were allegedly forfeited under Arkansas corporation law in force during the period Arkansas tried to forfeit the Aearth corporations' charters in 1984. *Russell* cites and clearly distinguishes *Sulphur Springs*. The holdings in *Sulphur Springs, supra*, and *Schmidt, supra*, reach the same result as to lack of standing based on forfeiture of a corporation *not in bankruptcy*. And *Russell*, in distinguishing *Sulphur Springs*, by logical extension necessarily distinguishes its later twin, *Schmidt*; finding those only applicable outside a corporate bankruptcy. *Schmidt* therefore cannot prevail over the holding in *Russell* based on the federal pre-emption doctrine. Further, even outside the bankruptcy context of this case, the holding in *Sulphur Springs* and *Schmidt* cannot be logically, legally or practically reconciled with Ark. Stats. Ann. §4-26-1104 (1987). As Judge Mixon in *Russell* points out, those decisions would allow the anomalous result that under §4-26-1104, a legally nonexistent dissolved corporation that is still winding down can sue and be sued, and thereby has more powers and rights than an undissolved, going corporation whose charter may have been revoked but could be reinstated.

13. If a corporation whose charter is forfeited cannot sue on an asset such as a *chose in action* or do anything with its assets, who owns and controls those assets? Under this Court's reading of *Sulphur Springs* and *Schmidt*, the control and ownership of corporate assets of a forfeited charter

corporation do not devolve on the shareholders (contrary to the majority of jurisdictions in this country where the assets do devolve on the shareholders if the corporation lacks capacity to pursue a *chose in action*). In Arkansas, under the holdings of *Sulphur Springs* and *Schmidt*, do such orphaned assets then simply exist in limbo forever not being able to be used by either the corporation or the shareholders? This makes no logical, legal, constitutional or practical sense. The rational and constitutionally proper answer is found in the *Russell* opinion at page 51 thereof:

> Under Arkansas law, a dissolved corporation retains title to its assets until a proper conveyance to the shareholders, and it follows that a corporation with a forfeited charter would likewise retain legal title. See 16A *W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations*, § 7997; *Duncan v. Jones*, 450 N.E. 2d 1019 (Ind. App. 1983); *Regal Constr. Co.*, 596 S.W. 2d 150 (Tex. Civ. App. 1979); *Wax v. Riverview Cemetery Co.*, 41 Del. 424, 24 A. 2d 431 (Super. 1942).

14. Even if the holdings in the pre-emptive federal cases of *Missouri, supra,* and *In re: Reserves Development Corp, supra*, did not conclusively establish unbroken legal existence and thus continuous capacity/standing for the Aearth corporations here as a matter of law, *Russell's* reasoning is the only rational and fair way to reconcile Arkansas corporate law so as to preserve for the shareholders the use and benefit status of the corporate assets when a corporation's charter is forfeited. If this Court's erroneous ruling on capacity and standing made the bases of its April 1998 Opinion is left standing, the disparity in the treatment of involuntarily dissolved corporations versus forfeited corporations as to the ability to use and prosecute the asset of a lawsuit under Arkansas law, as interpreted by this Court in that Opinion, will violate the Equal Protection Clause of the

14th Amendment and the anti-taking provisions of the 5th and 14th Amendments of the U.S. Constitution and Article 2, §§21 and 22 of the Arkansas Constitution.

Court's Decision On Standing Leaves Corporate Asset Unusable And Is Unconstitutional Denial of Due Process and an Unconstitutional Taking

15. If the court's April 1998 erroneous ruling stands, the ruling on the standing/capacity issue will effect an unconstitutional taking of the property of the corporations. Such an impermissible taking violates the 5th and 14th Amendments of the U.S. Constitution and Article 2, §§21 and 22 of the Constitution of the State of Arkansas. Both the U. S. and Arkansas Constitutions provide that private property shall not be taken for public use without just compensation. Implicit in these constitutional interdictions is a prohibition against the taking of private property for *private* use. The U. S. Supreme Court has repeatedly held that, where the application of a statute deprives a plaintiff of property for the private use and benefit of defendant, there exists a taking of property without due process of law which is forbidden by the 14th Amendment of the United States Constitution. See e.g., *Missouri Pacific Ry. Co. v. Nebraska*, 17 S.Ct. 130, 135 (1986); *Great Northern Ry. Co. v. Cahill*, 40 S. Ct. 457, 458 (1920). Further, the U. S. Supreme Court has repeatedly held that the taking by the State of the private property of one person or corporation without the owner's consent, is not due process of law, and is a violation of the Fourteenth Amendment to the U.S. Constitution. *Id.*

16. Act 304 of 1953, cited in the Aearth corporations' putative (but ineffective) certificates of revocation, provides for the revocation of a corporation's charter where a corporation fails to pay its franchise taxes. In the instant case, Act 304 as applied by this Court under *Sulphur Springs, supra*, and *Schmidt, supra*—if its revocation provisions could be

effective on a corporation in bankruptcy without lift of the stay which the federal law cited herein says it can't—would by such a revocation so applied work an impermissible taking of the Aearth corporations' property (this lawsuit) in which they had a vested right in violation of the 5th and 14th Amendments of the U.S. Constitution. Where an injury has occurred for which the injured party has a cause of action, the cause of action is a vested property right which is protected by guarantee of due process under the 14th Amendment of the U.S. Constitution. That 14th Amendment would be violated here if this Court ignores federal law and maintains that the state's revocation was effective to deny capacity/standing to the Aearth corporations. See e.g., *Johnson v. Fournet*, 387 So.2d 1336 (1st Cir. 1980).

Joint Venture Has Standing To Sue Incident To The Winding Up Of Its Affairs

17. The Court's 1998 Opinion is further erroneous insofar as it holds that Coal Processors lacks standing/capacity to sue. Coal Processors is a joint venture comprised of Aearth Development, Inc. and George Locke. The Joint Venture Agreement (PX 7.1; A. 805-806; T. 3349-3417) provides that the joint venture would be dissolved upon the "adjudicated bankruptcy, insolvency or involuntary dissolution of either party". That agreement further provides that, after dissolution or termination, the parties would cooperate in winding up the affairs of Coal Processors. Therefore, even if its bankruptcy could cause the dissolution of the joint venture, the venture was still able to wind up its affairs. Winding up generally includes the right to sue and be sued. See e.g., Ark. Stats. Ann §4-26-1104(b)(4). Further, the Arkansas Uniform Partnership Act (Ark. Stats. Ann §4-42-605), which also applies to joint ventures, clearly provides that a partner may continue to act for the partnership when a dissolution is caused by bankruptcy. Thus, Aearth could still

pursue Coal Processors' claims in this lawsuit upon and after an adjudication of bankruptcy.

18. Moreover, with respect to the purported revocations, the capacity/standing issue cannot affect the claims of Coal Processors, an Arkansas joint venture, because as a partnership it was never subject to forfeiture as a matter of law. Coal Processors was not in dissolution at the time this suit was originally filed and in any event, as a venture/partnership, it has standing to sue even in dissolution both under the terms of the Joint Venture Agreement and the Arkansas Uniform Partnership Act. Moreover, its majority venturer/partner, Aearth Development, Inc., whether or not it was legally forfeited (and federal bankruptcy law cited herein establishes it was not forfeited), could sue on its behalf.

This Court's Suggestion That Judicial Estoppel May Apply to Appellees is Not Supported by the Law or the Record in this Case

19. If the Court were to hold that judicial estoppel applies to Appellees/Cross-Appellants, that holding would be erroneous. The elements of judicial estoppel cannot apply here to the Aearth corporations or Coal Processors for the following dispositive reasons: (1) the Aearth corporations and Coal Processors, unlike Walker, did not list a value for this lawsuit as Walker did (and this cannot be disputed), so not even an arguable much less winnable basis for judicial estoppel is present; (2) the elements of judicial estoppel which all must be present for it to be found are not present here, viz., (a) there must be a prior adversary proceeding (and there wasn't); (b) in which the parties in this case were the same parties in that earlier case (they weren't parties in an adversary proceeding in the bankruptcy opposite the Bank); (c) the Bank did not rely on any representation by either Walker (according to the testimony of Rick Taylor, the Bank's bankruptcy lawyer at T. 6994-6997; A. 617-618), or the Aearth corporations or Coal Processors (and

could not have as to the latter two because they made no valuations the Bank could rely on and the trustee sued the Bank for damages into the eight figures so the Bank had to be aware); and (3) judicial estoppel is of doubtful validity in the 8th Circuit. *In re Air One, Inc.*, 75 B. R. 998, 1002 (Bankr. E. D. Mo. 1987) citing *Total Petroleum, Inc. v. Davis*, 822 F. 2d 734, 737 n. 6 (8th Cir. 1987).

Prayer

WHEREFORE, for the reasons and based on the authorities set forth above, the Court's erroneous April 30, 1998 Opinion should be withdrawn or reversed, and capacity and/or standing reaffirmed for all the Appellees consistent with this Court's July 18, 1994 Opinion, and Appellants' entire appeal denied as meritless, and the Circuit Court's remittitur order of June 21, 1996 reversed, and Appellees' Cross-Appeal granted in its entirety, and the original May 20, 1996 Judgment of the circuit court reinstated but without any remittitur, setoff, interest or attorney's fees (which items were erroneously awarded by the Circuit Court and not by the jury) being awarded to the Bank, i.e., with the total reinstatement of the $22.5 million verdict of March 13, 1996 as receptively awarded to Appellees/Cross-Appellants by the jury. In the alternative, Appellees/Cross-Appellants pray for a rehearing on the issues set forth herein. Appellees/Cross-Appellants further pray for such other and further relief as to which Appellees/Cross-Appellants may be entitled.

Respectfully submitted,

BURK LAW FIRM (TX)
A Professional Corporation
The Bremond House
711 San Antonio Street
Austin, Texas 78701
Phone: (512) 476-8350
Fax: (512) 476-8360

By: /s/ Michael G. Burk
Michael G. Burk
Texas Bar No. 03386500

Lead Counsel for Appellees/
Cross-Appellants

BURK LAW FIRM (DC)
1818 N Street, N.W., Suite 701
Washington, D.C. 20036-2406
Phone: (202) 966-4466
Fax: (202) 966-6441

James E. Burk
District Columbia Bar No. 187963

Co-Counsel for
Appellees/Cross-Appellants

WALKER & BLACK
1000 W. 3rd St., P O. Box 2780
Little Rock, Arkansas 72203
Telephone: (501) 376-2382
Fax: (501) 376-3352

Kendall R. Black
Arkansas Bar No. 85101

Co-Counsel and Local Counsel
for Appellees/Cross-Appellants

CERTIFICATE OF MERIT

The undersigned attorney for Appellees/Cross-Appellants respectfully certifies that this Appellees'/Cross-Appellants' Petition for Rehearing is made in the interests of justice, equal protection of the law and due process, and with a good faith belief in the merits of the arguments contained herein based on applicable Arkansas and federal law, and certifies that it is not made for the purposes of delay.

/s/ Michael G. Burk
Michael G. Burk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served by receipted hand-delivery on the following counsel of record on this 18th day of May, 1998.

Mr. Glenn W. Jones
Barber, McCaskill, Amsler, Jones & Hale, P.A.
2700 First Commercial Building
400 West Capitol Ave.
Little Rock, AR 72201

Mr. Phillip Anderson
Williams & Anderson
111 Center Street
22nd Floor
Little Rock, Arkansas 72201

/s/ Michael G. Burk
Michael G. Burk

APPENDIX I

IN THE ARKANSAS SUPREME COURT

NO. 92-1488

MICHAEL W. WALKER, AEARTH DEVELOPMENT, INC. AEARTH PREPARATION, INC., and COAL PROCESSORS
APPELLANTS/CROSS-APPELLEES

v.

FIRST COMMERCIAL BANK, N.A.
APPELLEE/CROSS-APPELLANT

APPEAL FROM THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

PETITION FOR REHEARING AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

[FILED; AUG 03 1994; LESLIE W. STEEN; CLERK]

GLENN W. JONES, AR BIN 63028
R. KENNY McCULLOCH, AR BIN 88044
BARBER, McCASKILL, AMSLER,
JONES & HALE, P.A.
2700 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 372-6175

Attorneys for Cross-Appellant

[CONTENTS, POINTS, and AUTHORITIES omitted in printing]

SUPREME COURT OF ARKANSAS

NO. 92-1488

MICHAEL W. WALKER; AEARTH DEVELOPMENT, INC.; AEARTH PREPARATIONS, INC.; and, COAL PROCESSORS
APPELLANTS/CROSS-APPELLEES

v.

FIRST COMMERCIAL BANK, N.A.
APPELLEE/CROSS-APPELLANT

APPEAL FROM PULASKI COUNTY
CHANCERY COURT NO. 90-2292

HON. ANNABELLE CLINTON IMBER, CHANCELLOR

REVERSED AND REMANDED

PETITION FOR REHEARING

Comes the Appellee/Cross-Appellant, FIRST COMMERCIAL BANK, N.A., in the above captioned case and respectfully petitions this Court to rehear the issues in this case because the opinion contains the following errors of law and fact:

1. This Court reverses established Arkansas law concerning transfer to Chancery, when an equitable defense, exclusively cognizable in Chancery, has been asserted by a party.

2. The opinion judicially merges courts of law and equity in Arkansas, in violation of the Arkansas Constitution.

3. This Court erred in finding that the transfer of this case from Circuit to Chancery court wrongfully deprived the Appellants of their right to a jury trial.

4. This Court erred in failing to address the issues of the capacity of the corporate appellants/cross-appellees and the standing of appellant/cross-appellee-Michael W. Walker.

5. This Court erred in finding that Appellants' violations of the rules for brief preparation were not flagrant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION

The Court's opinion dated July 18, 1994, contains errors of law and fact which require rehearing the issues in this case. The Court's brief opinion does not address several issues that were presented in Appellee/Cross Appellant's Cross-Appeal Brief.

I.

THE COURT'S OPINION REVERSES ARKANSAS LAW CONCERNING TRANSFER TO CHANCERY

This Court's opinion ignores and reverses Arkansas law requiring transfer to Chancery court when an equitable defense, exclusively cognizable in Chancery, has been asserted by a party. As early as 1909, this Court recognized that a party raising the defense of an equitable set-off entitled that party to a transfer to Chancery court where the party could have an opportunity to present his theory of the case. *Poultry Grower's Inc. v. WestArk Production Credit Association*, 246 Ark. 995, 1000-01, 440 S.W.2d 531 (1969), citing *Ewing-Merkel Electric Co. v. Louisville Light*

& Water Co., 92 Ark. 594, 124 S.W. 509 (1909). In *Poultry Grower's*, this Court noted that Plaintiff's "penurious condition" was a "peculiar equity" which justifies equitable interference.

In the case at bar it is undisputed that the corporate appellants and appellant-Walker were insolvent and in the midst of bankruptcy proceedings or, in Walker's case, had been discharged in bankruptcy. Previously, this Court has held that insolvency and bankruptcy are "peculiar equities" which are sufficient grounds for equitable interference. *Ewing-Merkel Electric Co., supra*, In 1987 the Arkansas Court of Appeals noted that if a defendant *alleges* a defense in the answer which is exclusively cognizable in equity, the party is entitled to have such defense tried as an equitable proceeding and the case transferred to equity. *Rogers Iron & Metal Corp v. K & M, Inc.*, 22 Ark.App. 228, 231, 738 S.W.2d 110 (1987). *See also Toney v. Haskins*, 271 Ark. 190, 608 S.W.2d 28 (Ark.App. 1980). This Court's opinion in the case at bar rejects prior case law directly on point without any explanation or justification. This violates the doctrine of *stare decisis* which requires adherence to previous precedent. *Independence Federal Bank, F.S.B. v. Paine Webber*, 302 Ark. 324, 789 S.W.2d 725 (1990).

As a basis for its opinion, this Court held that Ark. Code Ann. §16-63-206 (Michie 1987) is broad enough to include both set-off and recoupment to be available as a defense at law, regardless of whether appellants are insolvent, have filed bankruptcy or have been discharged in bankruptcy. This holding is erroneous. This Court has incorrectly stated in the case at bar that the order from the Bankruptcy court relaxing the automatic stay *as to the corporate appellants* removed any impediment to the assertion of Appellee's recoupment or set-off at law. This statement is incorrect for two reasons. First, it is undisputed that all Appellants were *insolvent* at all relevant times. This constitutes a "peculiar

equity'' which has been recognized under Arkansas law as sufficient to justify transfer to Chancery court. Secondly, the discharge injunction as to Appellant-Walker has never been stayed and, therefore, remains in full force and effect. This presents Appellee from asserting a counterclaim for set-off or recoupment at law. Hence, Appellee was required to assert an equitable counterclaim for set-off/recoupment.

Under Bankruptcy law, a discharge of a debt eliminates the debt. (*In re DeZarn*, 96 B.R. 93 (E.C.E.D. Ky. 1988). When a discharge in bankruptcy is granted, the automatic stay of proceedings against a debtor is replaced by a statutory injunction. *In re Walker*, 103 B.R. 281 (D.C. Utah 1989). The discharge injunction in the case at bar remains in effect, preventing Appellee from asserting a counterclaim for set-off or recoupment at law. Even if the discharge injunction had been set aside, all Appellants remain insolvent, which this Court has held constitutes a ''peculiar equity''. This is sufficient to give rise to equitable set-off or recoupment, which is exclusively cognizable in chancery.

This Court's present opinion reverses Arkansas law and contravenes federal bankruptcy law. Under §524 the bankruptcy court has power to punish for civil contempt where the *permanent injunction* is violated. *In re Hamilton Allied Corp*, 87 B.R. 43 (B.C. S.D. Ohio 1988). It is undisputed that Appellee is precluded from filing any type of action in state or federal court seeking to recover the amount which appellant-Walker has discharged in bankruptcy, and the amount the corporate appellants seek to dissolve in bankruptcy. (§§ 362 & 524) For instance, when Appellee filed its' initial Motion to Transfer to Chancery Court, Appellants moved for sanctions in bankruptcy court, alleging that Appellee had violated the automatic stay provisions of the bankruptcy code. That Court held that Appellee had technically violated the automatic stay under §362 of the Bankruptcy Code (R. 2308). Subsequently, the bankruptcy court

entered an order in the corporate Appellants' bankruptcy cases (Nos. 82-1102, 1103, 1104) relaxing the stay to allow Appellee to assert its equitable counterclaim for set-off/recoupment. (R. 2938-2939) Clearly, this relaxation of the stay did not convert Appellees remedy from one in equity to one *at law*. When a case has been filed in bankruptcy, that court has jurisdiction over questions of civil contempt under §524. *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001 (N.D. Ind. 1992). There was no order in Appellant-Walker's bankruptcy case (No. LR 84-695) which sets aside the discharge injunction under §524(a) of the Bankruptcy Code. This Section precludes any attempt by a creditor to collect, recover or *off-set* any debt subject to the discharge injunction, without being exposed to sanctions, such as civil contempt.

This Court's holding that "procedural rules" will not be applied to diminish the right to a jury trial is erroneous. The legislature was aware of Article 2 § 7 of the Arkansas Constitution when it enacted the predecessor to Ark. Code Ann. §16-57-106. The legislature decided that issues which are exclusively cognizable in equity should be tried in chancery court, even though the Constitution of Arkansas provides for trial by jury in "all cases *at law*". The legislature has enacted an exception to trial by jury which cannot be judicially reversed by this Court. Section 16-57-106 is not a "procedural rule", but is the law *as enacted by the legislature of this state*, and remains the law until repealed by the legislature. Further, the doctrine of *stare decisis* holds that a remedy that is exclusively cognizable in equity supersedes the right to trial by jury.

Two circuit judges and a chancery judge have followed the Arkansas Constitution and this Court's prior decisions and determined that this matter was should be adjudicated in chancery court. Likewise, Appellee relied upon the Constitution and *stare decisis*. This Court's opinion impiicitly re-

verses Arkansas law and contravenes the Arkansas Constitution without necessary explanation or analysis. Thus, this Court is now reversing *Ewing-Merkel, Poultry Growers, Smackover State Bank, Toney v. Haskins, Rogers Iron and Metal Corp*, and *Smackover State Bank, supra.* Appellee is entitled to rely on this Court's previous holdings, as were the circuit and chancery judges. To reverse the Court's previous holdings retrospectively is improper and erroneous. *Otter Creek Development Co. v. Friesenhahn*, 295 Ark. 318, 748 S.W.2d 344 (1988); *Southern Farm Bureau Life Ins. Co. v. Couger*, 295 Ark. 250, 748 S.W.2d 332 (1988).

II.

THE OPINION DOES NOT ADDRESS THE ISSUES ON CROSS-APPEAL

This Court is aware that the Chancellor ruled that Appellants/Cross-Appellees had standing and capacity to bring their claims, but proceeded to hold against the Appellants on the merits of their lender liability claim. (Opinion at 2). Appellee/Cross-Appellant requests that this Court address the issues set forth in the Cross-Appeal Brief and reverse the Chancellor's decision on these issues. The facts set out in the Cross-Appeal will not be restated.

A. Capacity

It is clear under Arkansas law that Aearth Development, Inc., Aearth Preparation, Inc., and Coal Processors (corporate-appellants) were not "legal entities" at the time of filing their original Complaint on November 28, 1984, since their corporate charters had been revoked. As such, they did not exist legally and could not file a complaint under Arkansas law. This Court is well aware of its previous holdings in cases directly on point. *See Committee for Utility Trimming, Inc. v. Hamilton*, 290 Ark. 283, 718 S.W.2d 933 (1986);

Sulphur Springs Recreational Park, Inc. v. City of Camden, 247 Ark. 713, 447 S.W.2d 844 (1969); and, *Moore v. Rommel*, 233 Ark. 989, 350 S.W.2d 190 (1961). It is clear that the corporate-appellants do not have capacity to pursue any complaint against Appellee/Cross-Appellant. Therefore, this Court should reverse the trial court's ruling that the corporate appellants had capacity to pursue the claim against Appellee/Cross-Appellant.

B. Standing

The chancellor's findings that Cross-Appellee Walker had individual standing to pursue this action are erroneous. Walker, as an individual, has no standing to pursue any claim against Cross-Appellant because he has not shown that he had any direct injury as a result of the allegations of the first consolidated Complaint. *See Taggart & Taggart Seed v. First Tennessee Bank, N.A.*, 684 F.Supp. 230 (E.D.Ark. 1988). Walker's alleged causes of action are, at best, derivative of the corporate-appellants. Clearly, Walker only acted in his official capacity as a representative of the corporate entities in the transactions with Cross-Appellant. This Court is aware that a corporation can only act through its directors, officers and employees.

Arkansas law is clear that the real party in interest is generally considered to be the person or corporation who can discharge a claim upon which the allegation is based. Previously, in *Walker v. Hyde*, 303 Ark. 615, 798 S.W.2d 435 (1990), this Court noted that if the injuries alleged to have been suffered by the plaintiff are derivative in nature, a shareholder does not have standing to pursue such claims. *Id.* at 618. This Court's opinion in the case at bar rejects its prior case law directly on point without any explanation or justification. To do so violates the doctrine of *stare decisis* which requires adherence to previous precedent. *Independence Federal Bank, F.S.B. v. Paine Webber, supra.*

III.

APPELLANTS' APPEAL SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE RULES OF THE SUPREME COURT

The Court correctly ruled that Appellants' violated the rules for brief preparation. However, the Court's ruling that Appellant's violations were "not flagrant" goes against this Court's warning in *Forrest City Machine Works v. Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993). *Mosbacher*, decided just fifteen months prior to this case, purported to be a warning to all practitioners who appealed to this Court that it would be less tolerant of failures to condense, *double space* and abstract in narrative form in the future. As the majority held in *Mosbacher*, "we enforce Rule 9 to hold practicing lawyers to a reasonably high standard of compliance." *Id.* at 587-588. Dissenting, Justice Dudley opined that he would dismiss the appeal because the appellant's abstract was *flagrantly* deficient, noting that "the abstract must be 'double spaced, except for quoted material, which may be single spaced and indented' ". *Id.* at 588-589, 592. Justice Dudley's final comment is appropriate here:

> . . . The majority opinion does a disservice to those practicing lawyers who have met the standard over the years, and it does an injustice to those lawyers who have previously had their cases dismissed for failure to comply with Rule 9. *Id.* at 592-593.

Here, Appellee complied with the Arkansas Rules of the Supreme Court, but Appellants flagrantly violated the rules of this Court, by failing to condense, abstract and double-space Appellee's were required to prepare a supplemental abstract consisting of two hundred and eight two (282) pages to provide the Court with a sufficient record necessary for an understanding of all issues presented to the Court on appeal. This opinion is tantamount to a reversal of *Mosbach-*

er and does a disservice to all practicing attorneys who have met the Court's standards and have complied with the guidelines set forth in *Mosbacher*. This allows Appellants to access this Court without complying with its rules and guidelines. Therefore, this Court should reverse its opinion delivered July 18, 1994, and dismiss this appeal for failure to comply with the Rules of the Supreme Court.

CONCLUSION

Ark. Code Ann. §16-57-106 clearly establishes that a party shall have a right to have an issue which is exclusively cognizable in chancery tried in the manner prescribed in cases of equitable proceedings. This section, which was enacted by the Arkansas legislature, is the law in Arkansas. The legislature was aware of Art. 2, §7 of the Constitution of Arkansas when it enacted this code section. The Court's opinion, here, judicially merges law and equity which has long been separated in Arkansas. Act 137 of Acts of 1854. Such judicial legislation is improper. Arkansas Constitution Art. 5 § 1.

Appellee/Cross-Appellant urges this Court to reconsider its opinion entered July 18, 1994, reverse it, and affirm the ruling of the Chancery Court or, in the alternative, hold that Appellants/Cross-Appellees did not have standing or capacity to sue, thereby reversing the Chancery Court and dismissing Appellants case in all respects.

Respectfully submitted,

BARBER, McCASKILL, AMSLER,
JONES & HALE, P.A.
Attorneys at Law
2700 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3414
(501) 372-6175

By: /s/ Glenn W. Jones
GLENN W. JONES AR BIN 63028
JOHN S. CHERRY, JR. AR BIN 66012

CERTIFICATE OF SERVICE

I, Glenn W. Jones, Attorney at Law, do hereby certify that on this 3rd day of August, 1994, I have Federal Expressed a true and correct copy of the foregoing document to: Mr. Michael G. Burk, Attorney at Law, 100 Congress Avenue, Suite 1800, Austin, Texas 78701; and Hand Delivered a true and correct copy to Ms. Dana Reece, Attorney at Law, 900 S. Shackleford Road, Suite 300, Little Rock, Arkansas 72211 and Honorable Annabelle Clinton Imber, Chanceller, Sixth Division Chancery Court, 301 Center Street, Suite 270, Little Rock, Arkansas 72201.

/s/ Glenn W. Jones
Glenn W. Jones

Supreme Court, U.S.
FILED
SEP 30 1998
CLERK

No. 98-392

In The

Supreme Court of the United States

October Term, 1997

MICHAEL W. WALKER, AEARTH DEVELOPMENT, INC., AEARTH PREPARATIONS, INC., AND COAL PROCESSORS, AN ARKANSAS JOINT VENTURE,

Petitioners,

v.

FIRST COMMERCIAL BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

GLENN W. JONES
JOHN S. CHERRY
JOSEPH F. KOLB
BARBER, MCCASKILL, JONES & HALE, P.A.
400 West Capitol Avenue, Suite 2700
Little Rock, Arkansas 72201
(501) 372-6175

PHILIP S. ANDERSON
LEON HOLMES*
WILLIAMS & ANDERSON
111 Center Street, 22nd Floor
Little Rock, Arkansas 72201
(501) 372-0800

Attorneys for First Commercial Bank, N.A.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

First Commercial Bank, N.A. is a party to this proceeding. First Commercial Bank, N.A. is a publicly held corporation.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES

Arkansas State Highway Commission v. Coffelt, 257 Ark. 770, 522 S.W.2d 839 (1975) 4

First Commercial Bank, N.A. v. Walker, 333 Ark. 100, 969 S.W.2d 146 (1998) 2

Herndon v. State of Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935) 5

Sebastian County v. Educare Centers of Arkansas, Inc., 296 Ark. 538, 761 S.W.2d 884 (1988) 4

State of Missouri v. U.S. Bankruptcy Court for the E.D. Arkansas, 647 F.2d 768 (8th Cir. 1981) 6

Walker v. First Commercial Bank, N.A., 317 Ark. 617, 880 S.W.2d 316 (1994) 2

STATUTES

11 U.S.C. § 362(a)(1) 5, 6

28 U.S.C. § 959(b) 6

STATEMENT OF THE CASE

Arkansas has never merged its law courts and its equity courts, which remain separate courts with distinct areas of subject matter jurisdiction. In Arkansas, the courts of law with original jurisdiction are called circuit courts; the courts of equity with original jurisdiction are called chancery courts. The Supreme Court of Arkansas has appellate jurisdiction over both types of courts.

This case was commenced in circuit court. First Commercial Bank raised the defenses of set-off and recoupment and moved to transfer the case to chancery court on the ground that these are equitable defenses. The motion was granted. The case was tried to the chancellor, who held, over First Commercial Bank's objection, that Michael Walker had standing and the corporate entities, Aearth Development, Inc., and Coal Processors, had capacity to sue.[1] After a six week trial, the chancellor ruled in favor of First Commercial Bank on the merits of the case.

The Aearth parties appealed. First Commercial Bank cross-appealed on the issues of Walker's standing and the capacity of the corporate entities to sue. The Supreme Court of Arkansas reversed on direct appeal on the ground that the chancery court lacked subject matter jurisdiction. Since the chancery court lacked subject matter jurisdiction, the Supreme Court of Arkansas did not reach the issues of standing and capacity raised on cross-appeal. The opinion stated, "The Court need not address

---

[1] Hereafter, we will refer to the petitioners collectively as "the Aearth parties."

any other issues in view of the ruling on this dispositive issue." *Walker v. First Commercial Bank, N.A.*, 317 Ark. 617, 619, 880 S.W.2d 316, 318 (1994). *See* Petition for Writ of Certiorari, Appendix D, p. 28a.

After remand, the case was transferred to circuit court and tried to a jury, which returned a verdict against First Commercial Bank. First Commercial Bank appealed to the Supreme Court of Arkansas and asserted, *inter alia*, that Walker lacked standing and the corporate entities, Aearth Development, Inc. and Coal Processors, lacked capacity to sue.[2] The Aearth parties responded that the Supreme Court of Arkansas had decided these issues in the first appeal, and that First Commercial Bank had waived these issues at trial. The Supreme Court of Arkansas held that it had not decided these issues in the first appeal, and that First Commercial Bank had not waived them. *First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 107-8, 969 S.W.2d 146 (1998). *See* Petition for Writ of Certiorari, Appendix A, p. 7a. The Supreme Court of Arkansas then held under Arkansas law that Walker lacked standing and that the corporate entities lacked capacity to sue. The Supreme Court of Arkansas decided no issue of federal law, nor was any issue of federal law presented to it. State law provided the entire basis for the opinion that the petitioner asks this Court to review. The Aearth parties seek review of the decision of the Supreme Court of Arkansas on the issue of whether the corporate entities, Aearth Development, Inc., and Coal Processors,

---

[2] Aearth Preparations, Inc., was dismissed at trial and did not appeal the dismissal.

have capacity to sue under Arkansas law. No issue regarding Walker's standing is presented in the petition.

REASONS FOR DENYING THE WRIT

1. The Federal Question Sought to be Reviewed Was Waived Below.

First Commercial Bank was the appellant in this appeal before the Supreme Court of Arkansas and asserted in its opening brief that Aearth Development, Inc. and Coal Processors lacked capacity to sue under Arkansas law. In the appellees' brief filed in the Supreme Court of Arkansas, the Aearth parties argued that the Supreme Court of Arkansas had ruled on the capacity issue in the prior appeal, so the determination in the prior appeal was the law of the case; and that First Commercial Bank had waived the issue below. The Aearth parties did not argue that the automatic stay provision of the federal bankruptcy code precluded the court from finding, under Arkansas law, that Aearth Development, Inc. and Coal Processors lacked capacity or standing, nor did the Aearth parties raise any other federal question in their brief.

The case was argued orally before the Supreme Court of Arkansas. During that oral argument, counsel addressed the issue of whether the Aearth parties had capacity to sue. However, counsel for the Aearth parties did not mention the automatic stay in the oral argument, nor did he raise any other federal question at oral argument.

The Supreme Court of Arkansas issued an opinion holding, under Arkansas law, that Walker lacked standing and that Aearth Development, Inc., and Coal Processors lacked capacity to sue. The Supreme Court of Arkansas rejected the argument that the issues of standing and capacity had been decided in the first appeal and rejected the argument that First Commercial Bank had waived these points below. The Supreme Court of Arkansas addressed every argument made by the Aearth parties in their brief and in oral argument. The Supreme Court of Arkansas did not address the applicability of the automatic stay because that issue had not been raised by the Aearth parties at the time the decision was rendered.

After the Supreme Court of Arkansas decided that Aearth Development, Inc. and Coal Processors lacked capacity to sue under Arkansas law, the Aearth parties asserted, for the first time in the appeal from the judgment on the jury verdict, that the automatic stay of the federal bankruptcy code applies to this case. Since the issue was raised for the first time in this appeal in the petition for rehearing, the issue was waived. It was not considered by the Supreme Court of Arkansas. *Cf. Arkansas State Highway Commission v. Coffelt*, 257 Ark. 770, 522 S.W.2d 839 (1975) (Issues raised for the first time in a petition for rehearing will not be considered.); *Sebastian County v. Educare Centers of Arkansas, Inc.*, 296 Ark. 538, 761 S.W.2d 884 (1988) (Issues raised for the first time in a petition for rehearing will not be considered.) The Supreme Court of Arkansas never addressed the applicability of the automatic stay because the issue was not raised prior to the petition for rehearing. The federal question the Aearth parties now seek to raise was never

properly presented to the state court, which never considered it. "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443, 55 S.Ct. 794, 795, 79 L.Ed. 1530 (1935). Here, the Aearth parties attempted to raise a federal question for the first time in a petition for rehearing. The Supreme Court of Arkansas did not entertain nor decide that question. That issue has been waived.

2. The Automatic Stay has No Application to this Case.

The second reason the Petition for Writ of Certiorari should be denied is that the petition raises an issue regarding the automatic stay provision of the federal bankruptcy code, but the automatic stay has no application to this case.

The automatic stay statute, 11 U.S.C. § 362 (a)(1), provides that a bankruptcy petition operates as a stay of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced *before the commencement of the case* under this title, or to recover a claim against the debtor that arose *before the commencement of the case* under this title. . . . " [Emphasis added.] Aearth Development, Inc. was incorporated in November 1977.[3] The bankruptcy petitions of both Aearth Development, Inc. and Coal Processors were filed in November

---

[3] Aearth Preparation, Inc., was incorporated in August 1981. It's charter was revoked on November 27, 1984. As noted

1982. The Aearth Development, Inc. corporate charter was revoked on November 16, 1984. It does not appear from the record that the franchise taxes were delinquent at the time the petition for bankruptcy was filed. No corporate franchise tax was listed as a debt or tax owed on the bankruptcy schedules. Apparently, the franchise taxes were first delinquent in November of 1983, which was after the petition for bankruptcy was filed. Thus, the revocation of the charter was for non-payment of franchise taxes that came due after the bankruptcy petition was filed. Hence, the action to revoke the corporate franchise was not one that could have been commenced "before the commencement of the case" nor was it to recover a claim against the debtor that arose "before the commencement of the case. . . . " Therefore, 11 U.S.C. § 362 has no application.

The case on point is *State of Missouri v. U.S. Bankruptcy Court for the E.D. Arkansas*, 647 F.2d 768 (8th Cir. 1981), where the Eighth Circuit noted that the bankruptcy court had recognized that the trustee was required to operate the warehouse "in accordance with the state law," including state laws requiring licensing of warehouses. 647 F.2d at 777. There, the trustee was ordered to acquire all necessary state licenses. *Id.* at 778. That a debtor in bankruptcy must comply with valid state laws, such as licensing laws, is required by 28 U.S.C. § 959 (b), which is the statute governing this case, not 11 U.S.C. § 362. Hence, the opinion of the Supreme Court of Arkansas is

---

above, Aearth Preparation, Inc., was dismissed in the circuit court proceedings and did not appeal that dismissal.

consistent with the one case directly on point and with the controlling provision of the federal statutes.

CONCLUSION

The federal question sought to be reviewed was waived below. Moreover, this case presents no substantial federal question for review. The petition should be denied.

Respectfully submitted,

GLENN W. JONES
JOHN S. CHERRY
JOSEPH F. KOLB
BARBER, MCCASKILL,
JONES & HALE, P.A.
400 West Capitol Avenue,
Suite 2700
Little Rock, Arkansas 72201

PHILIP S. ANDERSON
LEON HOLMES*
WILLIAMS & ANDERSON
111 Center Street,
22nd Floor
Little Rock, Arkansas 72201

Attorneys for First Commercial Bank, N.A.

(3)

Supreme Court, U.S.
FILED
OCT 8 1998
CLERK

No. 98-392

In The Supreme Court of the United States
October Term, 1998

Michael W. Walker, Aearth Development, Inc., Aearth Preparations, Inc., and Coal Processors, an Arkansas Joint Venture, Petitioners,

v.

First Commercial Bank, N.A., Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

REPLY BRIEF FOR PETITIONERS

RONALD J. MANN*
Assistant Professor of Law
THE UNIVERSITY OF MICHIGAN LAW SCHOOL
625 So. State Street
Ann Arbor, MI 48109-1215
(734) 764-5571

PROFESSOR ELIZABETH WARREN
Hauser Hall
Room 206
1575 Massachusetts Avenue
Cambridge, MA 02138

MICHAEL G. BURK
BURK LAW FIRM, P.C.
711 San Antonio Street
Austin, TX 78701
(512) 476-8350

JAMES E. BURK
BURK LAW FIRM, P.C.
Suite 701
1818 N Street, N.W.
Washington, DC 20036

**Counsel of Record*

---

6 pp

In The Supreme Court of the United States
October Term, 1998

No. 98-392

Michael W. Walker, Aearth Development, Inc., Aearth Preparation, Inc., and Coal Processors, an Arkansas Joint Venture, Petitioners,

v.

First Commercial Bank, N.A., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONERS

---

1. Respondent makes only a passing effort to respond to the merits of the petition. On that point, it argues that review is unnecessary because the unpaid franchise taxes did not accrue until after the bankruptcy case. Accordingly, it reasons that an action to recover the franchise taxes did not accrue "before the commencement of the case" for purposes of 11 U.S.C. § 362(a)(1). Br. in Opp. 5-6.

That argument is irrelevant. Revocation of a corporate charter during a bankruptcy proceeding violates a different provision of the Bankruptcy Code no matter when the debt arose. Section 362(a)(3) prohibits "any act to obtain possession

of property of the estate or of property from the estate, or to exercise control over property of the estate." Unlike Section 362(a)(1), nothing in that provision turns on the timing of the obligation. As we explain in the petition, revocation of a charter is an action exercising "control" over an asset of the debtor in violation of Section 362(a)(3). *See* Pet. 8-9. Furthermore, the decision of the Arkansas court on that question conflicts directly with the decision of the Ninth Circuit in *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association*, 997 F.2d 581 (1993). *See* Pet. 10-11. Respondent's brief in opposition to the petition cites neither Section 362(a)(3) nor *Hillis*.

Moreover, even with respect to Section 362(a)(1), respondent draws the wrong conclusion from the ambiguity in the record. The record in fact does not establish when the action for revocation accrued. It was respondent's burden to offer any relevant evidence into the trial record, but it failed to do so. *See* Ark. R. Civ. Proc. 9(a) (a party challenging capacity must plead the issue and establish the relevant supporting facts). Respondent cannot avoid the automatic stay simply by contending that on some other state of the record it might be possible for respondent to establish that one subsection of the statute does not apply.

2. The brief in opposition argues that petitioners somehow have waived a point that they consistently have been presenting to the Arkansas Supreme Court for years. In substance, the argument for waiver rests solely on the summary treatment of the issue in petitioners' principal brief on the merits of the case below. The issue in question was respondent's ninth point of appeal. 3 Appellant's Abstract and Brief 918-20. Under Arkansas law, capacity and standing are jurisdictional issues that are a prerequisite to the right to a jury trial. *Lineberry v. State*, 907 S.W.2d 705, 706 (Ark. 1995),

Jones v. American Home Life Ins. Co., 738 S.W.2d 387, 390 (Ark. 1987). Accordingly, it is clear that the Arkansas Supreme Court at least implicitly rejected respondent's arguments about capacity in its 1994 decision in petitioners' favor. Responding to that issue in the court below, petitioners took the logical position that the doctrine of law of the case obviated any further consideration of the issue. Appellees' Supplemental Abstract and Response Br. 68-69. *Cf., e.g., Montana v. United States*, 118 S. Ct. 1650, 1662 (1998) (discussing that doctrine under federal law).

We fail to see how an argument that a court already has decided an issue in our favor can be construed as an explicit or implicit waiver of the issue. Moreover, nothing in the 1998 opinion of the Arkansas Supreme Court suggests that it concluded that we have waived the argument. The Arkansas court's decision addressed the argument without mentioning waiver, basing its rejection of petitioners' position on the merits. The court did not treat petitioners as waiving an issue on which petitioners appear previously to have prevailed.

Finally, it is impossible to suggest that the lower court actually was unaware of the question at the time of its decision. After the question received sustained attention at oral argument, petitioner formally supplied the court with the briefs we had filed on the question on the earlier appeal, which discussed the automatic stay in detail. *See* Motion To Submit Capacity/Standing Briefing of Both Sides from Earlier Arkansas Supreme Court Appeal in This Case.

In sum, the question was before the lower court. The lower court was aware of the question. Nothing in the opinion of the lower court suggests a conclusion that petitioner waived the question. The question is properly before this Court for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael G. Burk
James E. Burk
Professor Ronald J. Mann
Professor Elizabeth Warren

October 1998